Affirmed

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Clifford

Submitted
Nov. 3. 1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~256.~~ 40

ALONZO S. HATCH, PLAINTIFF IN ERROR,

vs.

THE STANDARD OIL COMPANY OF CLEVELAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 16, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 256.

ALONZO S. HATCH, PLAINTIFF IN ERROR,

vs.

THE STANDARD OIL COMPANY OF CLEVELAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and proof of service	3	1
Writ of replevin and affidavit with return	5 & 7	2
Appearance of defendant	11	4
Declaration	11	5
Plea	13	5
Venire	14	6
Verdict	14	6
Judgment	14	6
Motion for new trial	16	7
Bill of exceptions	19	8
Certificate of clerk	45	16

1 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the Standard Oil Company of Cleveland, as plaintiff, and Alonzo S. Hatch, as defendant, a manifest error hath happened, to the great damage of the said Alonzo S. Hatch, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
2 same at Washington on the second Tuesday of October next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighth day of September, in the year of our Lord one thousand eight hundred & seventy-six.

[SEAL.] ADDISON MANDELL,
Clerk.

Allowed by—

H. B. BROWN,
District Judge.

GASKILL & GEER,
Att'ys for Plaintiff in Error.

3 The United States of America to the Standard Oil Company of Cleveland, greeting:

You are hereby cited and admonished to be and appear at Washington on the second Tuesday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Alonzo S. Hatch is plaintiff in error and you, the Standard Oil Company of Cleveland, is defendant in error, to show cause, if any there be, why the error in the judgment rendered against the said plaintiff in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry B. Brown, district judge, acting as circuit judge of the circuit court of the United States for the eastern district of Michigan, this eighth day of September, in the year of our Lord one thousand eight hundred & seventy-six.

HENRY B. BROWN,
District Judge.

4 STATE & EASTERN DISTRICT OF MICHIGAN, *ss*:

On this 8th day of September, in the year of our Lord one thousand eight hundred & seventy-six, personally appeared Harrison

Geer before me, the subscriber, Addison Mandell, clerk of said circuit court, and makes oath that he delivered a true copy of the within citation to Levi T. Griffin, one of the attorneys of record of the Standard Oil Company of Cleveland, the said defendant in error.

ADDISON MANDELL,
Clerk.

5 Pleas before the judges of the circuit court of the United States for the sixth circuit and eastern district of Michigan, at the district court-room in the city of Detroit, of the term of November, in the year of our Lord one thousand eight hundred and seventy-five.

IN THE CASE BETWEEN THE STANDARD OIL Company of Cleveland, Ohio, plaintiff,
and
ALONZO S. HATCH, DEFENDANT.

Be it remembered that on the twenty-first day of August, in the year of our Lord one thousand eight hundred and seventy-five, the said plaintiff, by Moore & Griffin, its attorneys, came into the court aforesaid before the judges thereof, and filed a precipe for summons in said cause, which said precipe is in the words and figures following, to wit:

Circuit court of the United States for the eastern district of Michigan.

THE STANDARD OIL COMPANY OF CLEVELAND
vs.
ALONZO S. HATCH.

The clerk will issue a writ of replevin in the above-entitled cause.
Detroit, Aug. 21, 1875.

MOORE & GRIFFIN,
Att'ys for Pl'ff.

6 And thereupon the said plaintiff produced an affidavit, under the statute, which was attached to and returned with the writ of summons issued in said cause, and is in the words & figures following, to wit:

STATE AND EASTERN DISTRICT OF MICHIGAN,
Wayne County, ss:

Thomas H. Wheeler, of the city of Cleveland and State of Ohio, being by me duly sworn, says that he is the agent of the Standard Oil Company of Cleveland, Ohio, the same being a body corporate and organized and existing under the laws of the State of Ohio; that the Standard Oil Company, plaintiff, named in the writ of replevin hereto attached, is lawfully entitled to the possession of the goods, chattels, and property described in said writ; that the said goods, chattels, and property have not been taken for any tax, assessment, or fine, levied by virtue of any law of the State of Michigan, nor seized under any execution or attachment against the goods & chattels of the plaintiff named in said writ liable to execution; and that said goods, chattels, and property are unlawfully detained in the county of Lapeer in said district by Alonzo S. Hatch, the defendant named in said writ, who is a citizen of the State and eastern district of Michigan, and that said goods, chattels and property are of the value of at least seventeen thousand five hun

dred dollars, and that affiant makes this affidavit for and on behalf of said Standard Oil Company.

THOMAS H. WHEELER.

Subscribed & sworn to before me at Detroit this 21st day of August, A. D. 1875.

ADDISON MANDELL,
Comm'r of Circuit Court U. S., Eastern District of Michigan.

7 UNITED STATES OF AMERICA:

The circuit court of the United States for the eastern district of Michigan.

The President of the United States of America to the marshal of the eastern district of Michigan, greeting:

You are hereby commanded that you do forthwith take into your custody the following goods and chattels, to wit, Nine hundred thousand sawed white-oak oil-barrel staves, on section four, at Deerfield, and forty-four thousand sawed white-oak oil-barrel staves, at Columbiaville, Lapeer County, Michigan, of the value of seventeen thousand five hundred dollars, and deliver the same to the Standard Oil Company of Cleveland, Ohio, and who is a citizen of the State of Ohio, plaintiff herein, if it shall give you security as required by law, to prosecute to effect this suit against Alonzo S. Hatch, of Lapeer, Michigan, and who is a citizen of the State of Michigan, defendant herein, and to return the aforesaid goods and chattels, if return thereof shall be adjudged, and to pay all such sums of money as may be recovered against him hereupon; and also that you summon the said Alonzo S. Hatch to appear before the circuit court of the United States for the eastern district of Michigan, at the district court room, in the city of Detroit, on the fourteenth day of September next, at ten o'clock in the forenoon of that day, to answer the said the Standard Oil Company, of Cleveland, plaintiff herein, concerning the unlawful detention of the said goods and chattels.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-first day of August, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[L. S] ADDISON MANDELL, *Clerk.*

8 EASTERN DISTRICT OF MICHIGAN, *ss:*

I do hereby certify and return that by virtue of the within writ I did, on the 26th day of August, A. D. 1875, as within I am commanded, replevy the goods and chattels following, to wit: Eight hundred and fifty thousand sawed white-oak barrel staves, which were appraised by Charles Gray and James H. Gray, disinterested persons, who were by me first duly sworn for that purpose, and whose appraisal is in writing, signed by themselves, and herewith returned; and I do further return that afterwards I delivered the goods and chattels so replevied to the within named the Standard Oil Company, the said Standard Oil Company having first executed and delivered to me the requisite bond under the statute, with John S. Newberry and Levi T. Griffin, of Detroit, in the said district, surety; and I do also further return that I did on the 30th day of August, according to the command of said writ, summon Alonzo S. Hatch, at Lapeer City, in said writ named, by

delivering a certified copy to him personally, and showing him the original writ with the seal of said court impressed thereon.

My fees, $32.20.

Dated Aug. 30th, 1875.

JOSEPH R. BENNETT,
Marshal,
By STEPHEN HENRY,
Deputy.

(Indorsed:) No. 5712. Circuit court of the United States for the eastern district of Michigan. The Standard Oil Company of Cleveland, pl'ff, vs. Alonzo S. Hatch, defendant. Replevin.

We hereby agree to become security for all costs for which the plaintiff may be liable in this case.

Detroit, Aug. 21, '75.

(Sig'd) MOORE & GRIFFIN.

Returned & filed Oct. 12, 1875.

A. MANDELL, *Clk.*

Moore & Griffin, att'ys for pl'ff.

9, 10 Annexed to writ:

We, the undersigned, freeholders residing in the county of Lapeer in the State of Michigan, having been first duly sworn by Stephen Henry, deputy United States marshal for the eastern district of Michigan, to make a true appraisement of all the property seized by him by virtue of the annexed writ of replevin, to appraise the several articles and parcels of property so replevied as follows, to wit:

The staves on section four in Deerfield, estimated by us to be about 800 M, at the sum of $15 per M	$12,000
The staves at Columbiaville, estimated by us to be about 50 M, at the sum of $18 per M	900
Total	$12,900 00

(Sig'd) CHA'S GRAY,
JAMES H. GRAY,
Appraisers.

11 And thereupon, to wit, on the sixth day of September, A. D. 1875, said defendant, by Gaskill & Geer, his attorneys, came into court and entered his appearance in the words and figures following, to wit:

Appearance.

The circuit court of the United States for eastern district of Michigan.

THE STANDARD OIL COMPANY OF CLEVELAND }
vs.
ALONZO S. HATCH. }

The defendant, Alonzo S. Hatch, in the above-entitled cause, comes and enters his appearance in said cause by Gaskill & Geer, his attorneys.

Sept. 6, 1875.

GASKILL & GEER,
Att'ys for Def't.

Afterwards, to wit, on the 13 day of September, A. D. 1875, the said plaintiff came and filed its declaration against the said defendant, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA:

In the circuit court of the United States for the east' 'rict of Michigan.

THE STANDARD OIL COMPANY OF CLEVELAND, Ohio, plaintiff,
vs.
ALONZO S. HATCH, DEFENDANT.

EASTERN DISTRICT OF MICHIGAN, *ss:*

12 Alonzo S. Hatch was summoned to answer the Standard Oil Company of Cleveland, Ohio, of a plea wherefore he unlawfully detains 900,000 sawed white-oak oil-barrel staves on section 4, at Deerfield, and 44,000 sawed white-oak barrel staves at Columbiaville, Lapeer County, Michigan, of the value of $17,500, of the goods and chattels of the said Standard Oil Company of Cleveland, Ohio, and thereupon the said Standard Oil Company of Cleveland, Ohio, a body corporate, organized and existing under and by virtue of the laws of the State of Ohio, and which is a resident and citizen of the State of Ohio, and doing business at the said city of Cleveland, plaintiff herein, by Moore & Griffin, its attorneys, complains of the said Alonzo S. Hatch, who is a citizen of the State of Michigan, and a resdent of the eastern district of Michigan, defendant herein, for that he, the said Alonzo S. Hatch, on the 21st day of August, A. D. 1875, at the city of Lapeer, in said State and district, received 900,000 sawed white-oak oil-barrel staves on section 4, at Deerfield, and 44,000 sawed white-oak barrel staves at Columbiaville, Lapeer County, Michigan, of the value of $17,500, of the goods and chattels of the said Standard Oil Com-
13 pany of Cleveland, Ohio, to be delivered to the said Standard Oil Company of Cleveland, Ohio, when he should afterwards be requested; but the said Alonzo S. Hatch, although often requested so to do, has not delivered the goods and chattels above mentioned to the plaintiff, but hath unlawfully detained the same, to the damage of the said plaintiff twenty thousand dollars.

MOORE & GRIFFIN,
Attorneys for Plaintiff.

To which said declaration the said defendant, by Gaskill & Geer, his attorneys, on the 21st day of September, A. D. 1875, filed in said court his plea in the words following, to wit:

UNITED STATES OF AMERICA:

In the circuit court of the United States for the eastern district of Michigan.

THE STANDARD OIL COMPANY OF CLEVELAND, Ohio, pl'ff,
vs.
ALONZO S. HATCH, def't.

The defendant, Alonzo S. Hatch, by Gaskill and Geer, his attorneys,

comes and demands a trial of the matters set forth in the plaintiff's declaration.

GASKILL & GEER,
Atty's for Def't.

14 *Venire.*

Therefore, to try the issue above joined, let a jury come thereof, by whom, &c., who neither, &c., because as well the said plaintiff as the said defendant have put themselves on that jury.

Verdict.

And the jurors of that jury of whom mention is made, to wit, Samuel Rosenthal, Levi W. Lee, Henry Moesta, Henry S. Robinson, George N. Mead, John W. Kimball, James W. Spaulding, George A. Johnson, Alonzo L. Beach, Randall Schuyler, Henry Quelch, and Benjamin F. Knapp, who were, on the twenty eighth day of January, A. D. 1876, elected, tried, and sworn well and truly to try the issue joined in this cause between the parties aforesaid, and after the evidence, the arguments of counsel, and receiving the charge of the court, on the 29th day of January, A. D. 1876, upon their oaths say that the said Alonzo S. Hatch did unlawfully detain the goods and chattels mentioned, in manner and form as the said The Standard Oil Company of Cleveland have in their declaration in this cause complained against him, and they assess the damages of the said plaintiff by reason thereof at the sum of six cents.

Judg't.

15 It is therefore considered by the court now here that the said plaintiffs do recover of the said defendant the said sum of six cents damages, assessed as aforesaid, together with said plaintiff's costs of this suit to be taxed, &c.

That afterwards, to wit, on the 14th day of July, A. D. 1876, said plaintiff's costs were taxed at the sum of $184.42.

Afterwards, to wit, on the 31st day of January, A. D. 1876, said defendant, by his counsel, M'r Pond, came into court, and, on his motion, an order was entered in the words following, to wit:

THE STANDARD OIL COMPANY OF CLEVELAND }
vs.
ALONZO S. HATCH. }

On motion of defendant, by M'r Pond, his attorney, ordered that said defendant have ten days' time in which to move for a new trial in this cause.

16 Afterwards, to wit, on the 7th day of February, A. D. 1876, said defendant entered a motion to set aside the verdict, and for a new trial, in the words & figures following, to wit:

In the circuit court of the United States for the eastern district of Michigan.

THE STANDARD OIL COMPANY OF CLEVELAND
vs.
ALONZO S. HATCH.

And now comes the said defendant, by Gaskill & Geer, his attorneys, and moves the court to set aside the verdict heretofore entered in this cause and the judgment entered therein, and to grant a new trial of said cause for the following reasons, to wit:

1st. The court erred in holding the contracts between the Standard Oil Company of Cleveland, Ohio, and the merits given in evidence to constitute an absolute sale of the staves in controversy, where they were piled in Lapeer County.

2d. The court erred in instructing the jury in accordance with the several requests of the defendant.

3d. The court erred in instructing the jury under the contract and the evidence that the title to the staves in controversy was vested
17 in plaintiff at the time they were seized under attachment and execution by the defendant.

Feb'y 7, 1876.

GASKILL & GEER,
Att'y' for Def't.

On March 6, 1876, an order was entered in open court in the words following, to wit:

THE STANDARD OIL COMPANY OF CLEVELAND
vs.
ALONZO S. HATCH.

On motion of defendant, by M'r Pond, his counsel, ordered that the time to settle bill of exceptions be and the same is hereby extended ten days from and after this date.

On April 3, 1876, an order was entered in open court in the words following, to wit:

THE STANDARD OIL COMPANY OF CLEVELAND
vs.
ALONZO S. HATCH.

On motion of M'r Pond, of counsel for defendant, it is ordered that said defendant have ten days further time in which to move for a new trial in this cause.

18 On April 14, 1876, an order was entered in open court in said cause in the words following, to wit:

THE STANDARD OIL COMPANY OF CLEVELAND
vs.
ALONZO S. HATCH.

On motion of M'r Pond, attorney for defendant, it is ordered that sixty days further time be and are hereby granted to defendant, in which to settle bill of exceptions in this cause.

On June 13, 1876, an order was entered in open court in said cause in the words following, to wit:

THE STANDARD OIL COMPANY OF CLEVELAND
vs.
ALONZO S. HATCH.

On motion of M'r Pond, of counsel for defendant, ordered that defendant have twenty days further time in which to settle bill of exceptions in this cause.

On June 28, 1876, bill of exceptions signed by the judge was filed in the case, which is hereto annexed, to wit:

19 UNITED STATES OF AMERICA.

In the circuit court of the United States for the eastern district of Michigan.

THE STANDARD OIL COMPANY OF CLEVELAND, Ohio,
vs.
ALONZO S. HATCH.

The issue joined between the parties in this case having been brought on to trial on the 29th day of January, A. D. 1876, before the honorable Halmer H. Emmons, circuit judge, and both parties being ready, and a jury of good & lawful men having been duly empanneled to try the said issue, the counsel for the plaintiff, to maintain said issue on its part, offered in evidence a contract in words & figures, as follows:

"This memorandum of agreement, made in duplicate this 11th day of March, eighteen hundred and seventy-four, at Cleveland, Ohio, by & between J. J. Merritt and Alfred E. Merritt, of Lapeer, Mich., party of the first part, and the Standard Oil Co. of Cleveland, Ohio, of the second part, witnesseth, that J. J. Merritt and Alfred E. Merritt has
20 this day sold to the Standard Oil Co. one million (1,000,000) oil-barrel staves upon the following terms & conditions, to wit, to be sawed and ended to thirty-four (34) inches in length, full three-quarters ($\frac{3}{4}$) of an inch in thickness when dry, and of an average width so as not to require more than eighteen (18) to the barrel when seasoned & jointed; to be well manufactured from good sound white oak, and to be in every respect a first class merchantable article; to be delivered on board of cars in Cleveland, Ohio, at the rate of thousand each month, and the entire number on or before the first day of June, 1875, at & for the price of thirty (30) dollars per thousand, subject to count & inspection by the Standard Oil Co., who agree to receive and pay for the same as fast as inspected. It is also agreed that said J. J. Merritt and Alfred E. Merritt shall have the privilage of making sight draft through bank on said Standard Oil Co. for twenty (20) dollars per M merchantable staves, with bill of lading signed by railroad co. attached as evidence of shipment of cars on which drafts are made. It is further agreed that said cars shall be so loaded as to have a nett value in
21 Cleveland, Ohio, of amount of drafts after calling and paying freight.

"JOHN J. MERRITT &
"ALFRED E. MERRITT.
"STANDARD OIL CO.,
"Per S. H. COOK.

"CLEVELAND, OHIO, *March* 11, 1874."

The counsel for plaintiff then offered in evidence another contract in words and figures, as follows:

"Whereas a certain contract was made and entered into on the eleventh (11th) day of March, A. D. 1874, by & between J. J. Merritt and Alfred E. Merritt, of Lapeer, Lapeer Co., Michigan, of the first part, and the Standard Oil Company, of Cleveland, Ohio, of the second part, relating to the sale & delivery of one million (1,000,000) white-oak staves, which contract is still subsisting between said parties, and is to continue subject to the modifications hereinafter mentioned; and whereas it is for the accommodation of said J. J. Merritt & A. E. Merritt that they receive certain advances upon said staves before the time agreed upon in said contract, and they having requested the same: now, therefore, it is agreed by & between the said firm of J. J. Merritt & A. E. Merritt, as parties of the first part, and said Standard Oil Company as parties of the second part, as follows, to wit: said first parties agree to make & de-
22 liver to second party the staves (not yet delivered) according to the terms of said contract' properly piled in some suitable & convenient place, to be agreed upon by said parties, on land in Deerfield, in said Lapeer County, controlled by said second party, the delivery to be made as fast as sawed by said first parties; said second party is to furnish a man to count as nearly as may be said staves, from week to week, as the same are piled, which will require one half day each week; the other 5½ days in each week said first parties are to furnish said man employment about said staves business at full, fair wages, so as to keep said man employed all the time at a fair remuneration, provided that second party may furnish employment for said man, and shall be entitled to his services whenever they need him; balance of time to be employed by first parties. When said staves shall be piled & counted, said counter shall give the first parties a certificate of the amount piled since any former count, but such certificate shall not be considered as final, it being fully understood and agreed that said counter is not employed as an inspector, but that his duties are confined to obtaining as nearly as may be possible an approximate estimate of the staves
23 thus piled, for the purpose of determining from time to time the amount of advances the party shall be entitled to receive, as stipulated herein. Whereupon the delivery of said staves so counted shall be deemed complete, and said staves shall then become and thenceforth be the property of second party, absolutely & unconditionally; and upon the presentation of such certificate of count at the office of said party in Cleveland, Ohio, said second party agrees to pay upon the staves so as aforesaid delivered and counted the sum of seventeen ($17) dollars per thousand staves by draft on New York. It is further agreed that as the agents of second party, said first parties shall on or about the fifteenth day of August, 1875, begin to draw, ship, and forward said staves, and continue to draw, ship, & forward the same at the rate of not less than 100 M per month thereafter to second party, at the place, in the manner, and upon the terms agreed upon in said contract, at their own expense. It being mutually agreed that any and all staves that may be piled up by said first parties shall be allowed to stand three months before the second party shall have the privilege of calling for shipment of the same, and the second party have the
24 privilege of insisting upon any staves that may have been piled being allowed to remain piled eight months before its shipment. It is, however, agreed that the whole quantity shall be delivered by January 1st, 1876, and it is further agreed that no interest is to be computed

and charged or deducted for a longer period than eight months; but if, through any unforeseen cause, and not at the request of said second party, the shipment of said staves is delayed beyond said period of eight months, then, in that event, said first parties shall pay the second party interest, as already agreed, and in addition thereto shall, at their own cost, continue to pay cost of insurance as heretofore provided. The second party also has the privilege at any time of calling upon the first parties to go on and make the shipments direct from the saw, as agreed in original contract; second party agrees to pay the first parties the balance of the contract price of said staves as stipulated in said contract; provided, however, that there shall be deducted therefrom interest at 10% per annum on the advances of seventeen dollars per M made as aforesaid from time paid until staves shall be received at Cleveland aforesaid, as per terms of said contract, also all sums which second party may have paid for insuring
25 said staves against loss by fire after delivery of same to it at Lapeer, as aforesaid, and which insurance first parties hereby authorize and request second party to obtain to the amount of eighteen dollars per M; and provided further, that if said staves shall be destroyed by fire before their delivery at Cleveland, the loss above said eighteen dollars per M shall fall upon first parties. And it is further agreed that if first parties should fail to draw, ship, & forward to second party at Cleveland, the staves aforesaid, at the time and in the manner provided in this contract and in the contract to which this is supplementary, then the second party is authorized to procure the same to be done and to deduct all the expenses of every kind which shall attend the doing of it from the balance of the contract price of said staves, and shall also deduct said 10% interest on advances and all advances and insurance premiums; and should any balance of said contract price then remain, second party is to pay it to first parties, but should the sum exceed the contract-price the first parties shall, on demand, pay second party such excess. All the provisions of the contract first above refer'ed to in regard to specifications, delivery-price, inspection, culling, and all
26 other things not expressly changed by the contract are to remain in force, this being a modification of said contract, in regard to the particulars herein expressly stated, and made for the benefit and at request of first parties, and for no other purpose.

"In witness whereof said parties have signed their names hereto this twenty-eighth day of August, 1874.

"J. J. & A. E. MERRITT.
"STANDARD OIL COMPANY,
"By A. M. McGREGOR."

The counsel for plaintiff then offered in evidence a lease of land from J. J. & A. E. Merritt to Standard Oil Company, on section four in Deerfield, describing a piece of land 20 rods east & west, & 30 rods north & south, which lease contains the usual terms, covenants, and conditions, dated October 4, 1874, for one year, to be used for piling and storing staves, upon which description of land all but fifty thousand of the staves were piled, the fifty thousand being piled on land owned by the Merritts, and about 100 or 150 feet distant from the large pile of staves. It was also admitted that there was situate and being on the land leased to the Standard Oil Company a barn, blacksmith-shop, a store, & a boarding-house owned and occupied by the Merritts during the time the staves were being made and at the time the attachment-suits were commenced. There was a road leading to & from the mill between the boarding-house & blacksmith-shop and the place where the staves

27 were piled on the leased land. The mill where the staves were made was on the same section and a little distant from the other buildings. None of the staves were manufactured when contracts were made.

And thereupon the counsel for the plaintiff in open court admitted that the lease in question was never filed in the township clerk's office where the lessors resided, and that it was never recorded in the office of the register of deeds in said county where the lands were situated; and thereupon the counsel for the defendant in open court admitted that the plaintiff and J. J. and A. E. Merritt acted in good faith in making said contracts. They also admit the execution of said contract and said lease, and that all the staves seized under the writ of replevin in this suit were manufactured by said Merritts, and all except fifty thousand of them were piled upon the land described in said lease.

Plaintiff then offered in evidence the deposition of G. I. Vail, who testified that he was cashier for the plaintiff, and that between Oct. 10, 1874, and April 29, 1875, fourteen certificates, signed by F. Donnely, were sent to the office of the plaintiff, with drafts accompanying
28 the same, drawn by J. J. and A. E. Merritt on the plaintiff, which were paid by the plaintiff, amounting in all to $15,148.00.

Plaintiff also called as a witness Thomas H. Wheeler, who testified that he was the general purchasing agent of the plaintiff in the stave department and had been for two years. Plaintiff's counsel then showed witness fourteen certificates, which were in all respects like the following, except as to dates and amounts. Witness further testified that the signatures to said certificates were genuine; that F. Donnely, by whom they were signed, was in the employ of the Standard Oil Company at Lapeer for the purpose of looking after the interests there and for the purpose of counting these staves; that he knew the premises described in said lease; that the same were pointed out to him by the Merritts on the 11th of November, 1874, first time witness was on the premises; that the said Merritts had then already commenced manufacturing the staves, and had then manufactured from twenty-five to forty thousand; that witness was again on the premises in January, 1875; went there for the purpose of looking after the staves; that he then counted them, and there were then
29 manufactured & piled upon said premises from four hundred to five hundred thousand; that he was again on the premises on the 10th of July, 1875, and made a thorough count of the staves, one of the Merritts being with him. The number of staves so counted was seven hundred and eighty thousand. That the witness gave the same in round numbers at eight hundred thousand; that of said staves all but about fifty thousand were piled upon the premises described in said lease; and that said fifty thousand were in a pile by themselves, from one hundred to one hundred and fifty feet from the larger pile; that he counted the staves as aforesaid prior to the levying of the attachment by the defendant; that there were no other staves about the premises, except a few elm staves, and such elm staves not on the premises covered by said lease; that the larger pile of staves were from two hundred to five hundred feet from the mill.

Witness further testified that Donnely was employed the most of the time by the Merritts; that under his employment for the oil com-
30 pany he was to count and give certificates for the staves.

Counsel for the plaintiff then offered in evidence the several certificates, to the introduction of which the counsel for the defendant did then & there object, for the reason they were incompetent & irrele-

vant, and for the further reason that the recitals in said certificates cannot affect the rights of the defendant without proof aliunde.

The court overruled the objection, and the certificates were received in evidence. The counsel for the defendant excepted to the ruling and decision of the court.

The certificates offered in evidence were in words and figures as follows, only varying as to time & amount:

Certificate of stock delivered & piled.

No. 1. Certificate.

This is to certify that J. J. & A. E. Merritt, of Lapeer, county of Lapeer & State of Michigan, has delivered to the Standard Oil Company of Cleveland, O. (in compliance with contract dated day of , 1874), thirty (30) thousand merchantable white-oak oil-barrel staves from fifteenth day of September to seventh day of October, 1874, and
31 have properly piled same on land leased to and occupied by said Standard Oil Company, said land being situated in Deerfield, county of Lapeer, State of Michigan.

(S'g'd) J. J. & A. E. MERRITT.

Dated at Lapeer this seventh day of October, 1874.

The above is correct.

F. DONNELY, *Inspector.*

On the cross-examination, the witness testified that Donnely was paid for his time mostly by the Merritts. Donnely was to count the staves and give certificates; that was all he had to do. I don't recollect that Merritt stated any definite number of feet the leased land covered; he simply pointed it out to me. Merritt went up to the mill with me, but I was alone when I made the last count. It was no part of my business under the contract to count the staves. It was conceded that there was nothing marked on the ground to show the extent of this lease.

32 Ambrose M. McGregor was also called as a witness by plaintiff and testified that he was an officer of the Standard Oil Company, and had been since February, 1872; that he negotiated the second contract; that the business of the oil company was refining and dealing in petroleum and its products; that the staves in question were contracted for to be made into barrels in which to ship the oil manufactured; that in the year 1875 the oil company used twenty-five million staves, and manufactured one million four hundred and fifty-one thousand five hundred and fifty-three barrels; that the company purchased its staves at various places, including Kentucky, West Virginia, Wisconsin, Ohio, Indiana, Pennsylvania, and Michigan. Whereupon the plaintiff rested its case.

33 The defendant, to maintain & prove the issue on his part, called the defendant, Alonzo S. Hatch, who, being sworn, testified that he was sheriff of Lapeer County; that on the 15th day of July, 1875, he levied upon and seized the staves in question by virtue of a writ of attachment in favor of Rodney G. Hart and against John J. and Alfred E. Merritt; that he subsequently had six other attachments placed in his hands, also two executions in favor of different persons and against the Merritts, & that by virtue of these several writs he claimed to hold the staves, the amount of said writs being $5,000, or a little more; that

at the time he made the levy he found no person in possession for plaintiff; that the property was where it was piled by the Merritts.

The writs were offered & received in evidence.

John J. Merritt was called and sworn as a witness on part of defendant.

On being asked by the court what the defendant expected to show by the witness, the counsel for the defendant stated: "We propose to show by this witness that the staves were not cut & made at the time some of these certificates were made; that they were placed there subse-
34 quently, the estimates being made before the staves were put there. We also propose to show that the 50,000 staves were never in fact counted, and no certificate given specially applicable to them."

The court excluded the evidence upon the ground that if certificates were given and drafts drawn upon the representation that the staves were piled according to the contract—if they were subsequently piled there in compliance with it—that passed the title to the plaintiff, and the facts offered to be shown are immaterial.

To the ruling and decision of the court in excluding the evidence proposed, the counsel for the defendant did then & there except.

The counsel for defendant then offered in evidence two inspection reports sent to the Merritts by the Standard Oil Co., covering a portion of the staves in controversy, which were received in evidence, copies of which are substantially as follows:

OFFICE STANDARD OIL COMPANY,
Cleveland, Ohio, Sept. 21st, 1875.

Shipper, J. J. & A. E. Merritt.

Inspection report on your shipment staves via rail to Detroit via scow Wellhouse to Cleveland:

35

Car No. initial.	Gross.	Average.	Net, 1st class.	Net, 2nd class.	Culls.	Total.	Price.	Amount.	Freight.
	78, 616	18	78, 616	.....	.....	.....	30	2, 358 48	355 68
	6, 040	21	.....	5, 177	.....	83, 793 staves	20	103 54	
					11, 512			2, 462 02	
						Fr't	.....	355 68	
								2, 106 34	
						Less 1.25 per M for dockage & teaming	.....	104 74	
								2, 001 60	

OFFICE STANDARD OIL COMPANY,
Cleveland, Ohio, Sept. 30, 1875.

Shipper, J. J. & A. E. Merritt.

Inspection report on your shipment staves, rail to Detroit, scow Wakeup to Cleveland.

Car No. Initial.	Gross.	Average.	Net, 1st class.	Net, 2nd class.	Culls.	Total.	Price.	Amount.	Freight.
	40,368	18	40,368	.....	.....	.....	30	1,211 04	401 80
	40,367	172	41,235	.....	.....	.....	30	1,237 05	
	7,440	21	.....	6,377	.....	87,890 staves	20	127 54	
					12,375			2,575 63	
						Fr't	.....	401 80	
								2,173 83	
						Less $1.25 per M for dockage & teaming	.....	109 97	
						Net cr	.....	2,063 86	

Defendant rested.

This is substantially all the testimony introduced in the trial of this cause.

36 The evidence being closed, the counsel for the defendant requested the court to charge the jury as follows:

First. That under the two written agreements given in evidence, made between plaintiff and the Merritts, the only interest which the plaintiff acquired before the delivery of the staves at Cleveland was security for advances, in the nature of a mortgage interest.

Second. That if there was no actual delivery and continued change of possession of property, the agreements, so far as they vested any such interest in plaintiff, were void as against levying or attaching creditors, the same not having been recorded in the township where mortgagor resided.

Third. That as the pile of about 50,000 staves which appeared by the evidence not to have been piled upon the land mentioned in the lease given in evidence, if the evidence does not show they were counted the title did not pass to the plaintiffs for any purpose, and as to this 50,000 the defendant is entitled to their verdict.

37 Fourth. That under the agreement given in evidence between the plaintiff and the Merritts, no title to any staves passed until actually placed upon the land described in the lease, and actually counted by Donnely.

Fifth. That no title passed to the plaintiff as vendees to any staves other than those by the first agreement contracted to be sold, and if the jury find from the evidence that there are any portion of the staves replevied which did not answer to the staves so contracted to be sold, as to such portion the plaintiff' are not entitled to recover.

Sixth. That the verdict of the jury will be for the defendant.

And the said circuit judge did then & there refuse to give in charge to the jury each of said requests so asked to be given in charge to the jury by defendant' counsel, except as contained in the general charge of the court. And the counsel for the defendant did then & there seperately except to the decision & refusal of the said circuit judge to give the said 1st, 2nd, 3d, 4th, 5th, & 6th requests respectively so asked by defendant's counsel to be given in charge to the jury.

38 The court then charged the jury as follows:

GENTLEMEN: This is a controversy between two citizens as to who shall loose some money, to which we suppose both parties are honestly entitled, as we suppose the creditors have honest debts, which it would afford you and all of us pleasure to secure, if the law would permit it. The facts generally to which I shall call your attention are that these

plaintiffs agreed with the Merritts to manufacture for them 1,000,000 of staves, and they first make an ordinary commercial cantract. It is to be presumed that the parties were abundantly solvent and able to deliver them at Cleveland, but being subsequently ascertained that it would be necessary for this corporation to make advances to the Merritts in order to enable them to go on and perform their contract, it appears they entered into a second contract, whereby they should not trust the Merritts with the whole sum of the advances they make, and in order to prevent running the risk of loss, they provide in the contract that as fast as the staves were manufactured they should be piled upon land adjoining the mill, that they should be counted by a person nominated in
39 the contract, and that as soon as piled and counted the title in the property should pass to this plaintiff. Now it would embarrass you & have no practical tendency here to refer with any particularity to the clauses in that agreement, which as a matter of law we have decided cannot, so far as the exigencies of this trial are concerned and for the purposes of our present ruling, impair the literal legal force of the clause which says that when the property is so placed and piled the title passes to the plaintiff; and we charge you, therefore, that if you believe from the proof—and I believe there is no conflict so far as that proof is concerned—that the property was so placed & piled either upon the leased land or upon land in the vicinity of the leased land in the vicinity of the mill, that the title to the staves did pass to the plaintiff in this action.

It appears here that certificates signed by the Merritts, who were the vendors of this property, have been issued to the plaintiff, stating that this property was so placed where the contract called for it, and we hold that if the plaintiff acted upon those certificates and declarations of Merritts, it binds Merritt. In the language of law he is estopped, and is held back from coming into a court of justice & proving that the thing he declared to be true is not true; that would be a fraud;
40 that would be dishonest; and if therefore at any period before the issuing of these attachments on the part of local creditors this property was placed where Merritts said it was at the time he issued the certificates, that would by retroactive in its effect and produce the same consequence between Merritts and the plaintiff as if the property was on the spot at the moment the certificates were issued. If the certificates were issued one month and the property came the next, as between the parties, it would work precisely the same legal consequence, and whatever is effected between the parties anterior to the attachment, it is subject to whatever estoppels and equities, whatever legal conditions, exist between Merritts and the oil co. before the attachments were levied; those conditions apply between the attaching creditors and the plaintiffs. Therefore if the title was complete in the plaintiff as between Merritt & the plaintiff, the title is also complete as between the creditors and the plaintiff, but that principle is subject to one more qualification. The statute provides that when a purchaser buys property and leaves it in the possession & apparent control of the vendor so as to give him a delusive credit, so as to leave the public with-
41 out any knowledge that the property has been purchased and that the title has passed, that shall be presumptively fraudulent, but it is only a presumption, a suspicion. It is an indication of fraud subject to be explained, and I say to you that in the law it is even deemed a sufficient explanation if the sale is proven to be bona fide for a lawful purpose and upon a full consideration. If there has been no purpose to deceive or defraud in leaving the property in the possession

of the vendors, and if there is some justifiable business reason in leaving it there, and if you think that this was an honest transaction, that this oil company needed the barrels, that they paid a fair price for the staves, and this mode of transferring them from the manufactory to the place where they were to be used was ordinarily prudent, then if you find the other facts as I have stated them to be, then your verdict will be for the plaintiff.

The counsel for the defendant did then & there duly except to that part or portion of the charge given by the court which holds that the title to staves not piled upon the land in question but in the vicinity would pass.

42 And to that part or portion of the charge given by the court which reads as follows, the counsel for the defendant did then and there duly except: "And if, therefore, at any period before the issu-
43 ing of these attachments on the part of local creditors, this property was placed where Merritts said it was at the time he issued these certificates, that would be retroactive in its effect, and produce the same consequence between Merritts and the plaintiff as if the property was on the spot at the moment the certificates were issued."

And the counsel for the defendant did then & there duly except to that part or portion of the charge given by the court which reads as follows, to wit: "If the certificates were issued one month and the property came the next, as between the parties, it would work precisely the same legal consequence, and whatever is effected between the parties anterior to the attachments it is subject to whatever estoppels and equities, whatever legal conditions, exist between Merritts and the oil co. before the attachment was levied; those conditions and those equities apply between the attaching creditors and the plaintiff."

And the counsel for the defendant did then & there duly except to that part or portion of the charge given by the court which reads
44 as follows, to wit: "Therefore, if the title was complete in these plaintiffs as between Merritts and the plaintiff, the title is also complete as between the creditors and the plaintiff."

And under the instructions so given by the said circuit judge, the said issue was then & there submitted to the jury, and the said jury, without retiring from the bar, did render a verdict in favor of the plaintiff, and assessed its damages at six cents. And inasmuch as none of said exceptions so taken as aforesaid appear of record in this cause, this bill of exceptions is settled and signed by said circuit judge, on this 24th day of June, 1876, on the prayer of said defendant, to which day the time was duly extended.

H. H. EMMONS,
Circuit Judge.

(Indorsed:) 5712. The circuit court of the United States for the eastern district of Michigan. The Standard Oil Company of Cleveland, Ohio, vs. Alonzo S. Hatch. Bill of exceptions. Filed June 28th, '76. A. Mandell, cl'k.

45 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify the above and foregoing to be a true transcript of the record of judgment in said court, in the case of The Standard Oil Company of Cleveland against Alonzo S. Hatch, the same having been carefully compared by me with the original thereof of record & on file in my office, and is a correct

transcript therefrom and of the whole thereof; also the original bill of exceptions filed in said cause.

In witness whereof I have hereunto set my hand and the seal of said court, at Detroit, this fourth day of October, A. D. 1876.

ADDISON MANDELL, *Clerk.*

(Indorsed:) Supreme Court U. S. Alonzo S. Hatch, pl'ff in error, vs. The Standard Oil Company of Cleveland, def't in error.

(Indorsement on cover:) No. 256. Alonzo S. Hatch, plaintiff in error, vs. The Standard Oil Company of Cleveland. E. Michigan C. C. U. S. Filed 16th October, 1876.

SUPREME COURT

—OF THE—

UNITED STATES.

No. 256.

ALONZO S. HATCH,

Plaintiff in Error,

vs.

THE STANDARD OIL COMPANY, OF CLEVELAND, OHIO,

Defendant in Error.

Brief for Plaintiff in Error.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

ASHLEY POND, Attorney for Plaintiff in Error.

LAPEER, MICH.:
THE CLARION STEAM PRINTING HOUSE.
1879.

SUPREME COURT

—OF THE—

UNITED STATES.

ALONZO S. HATCH,
Plaintiff in Error,
vs.
THE STANDARD OIL COMPANY, OF CLEVELAND,
Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

The action in the Court below was replevin; plaintiff in error against defendant in error, to recover the possession of a quantity of staves. The plaintiffs in the replevin suit claimed to own the staves in controversy. The defendant, who was Sheriff of the county of Lapeer, Michigan, had levied upon and taken possession of said staves under and by virtue of certain writs of execution and attachment running against the goods and chattels of John J. and A. E. Merritt.

The trial was by jury, with verdict and judgment in favor of plaintiffs below, and the defendant brings the case here by writ of error for review.

The facts giving rise to the litigation are substantially as follows:

March 11th, 1874, an agreement (Record p. 18,) was entered into between the Standard Oil Company, the defendant in error, a corporation located at Cleveland, Ohio, and the above namad J. J. & Alfred E. Merritt, residents of Lapeer county, Michigan, whereby in terms the Merritts sold to the Standard Oil Company one million of oil barrel staves, to be sawed of certain dimensions, and to be well manufactured from good, sound white oak, to be deliverad on board cars in Cleveland, Ohio, on or before the first day of June, 1875, and the Standard Oil Company to receive and pay for said staves as fast as inspected, the sum of $30 per M.

Under date of August 28th, 1874, by another written agreement between the parties, (Record, p. 9,) the agreement of March 11, 1874, was modified; the apparent occasion for the modification being the inability of the Merrits to carry out the first contract without receiving advances from the Oil Company upon the staves before delivery.

October 4th, 1874, Merritts made a lease to the Oil Company describing a piece of land situated in the township of Deerfield, Lapeer county, which adjoined the mill owned by the Merritts at which the staves in controversy were constructed, and upon which was situated a barn, blacksmith shop and store, a boarding house owned and occupied by the Merritts during the time the staves were being made, and at the time they were seized by the plaintiff in error.

After the execution of the agreement of August 28th, 1874, and of said lease, the Merritts began to manufacture the staves and caused them to be piled upon the premises described in said lease. One Donely was employed to count them, and certificates of the number were from time to time given, and advances made thereon by the Oil Company. About fifty thousand in number of the staves replevied were not piled upon the land included in the lease, but upon land immediately adjoining.

On the trial, defendant offered to show that fifty thousand of the staves in controversy were never in fact counted, and no certificate given specifically for them. The Court below excluded this testimony.

At the time these agreements between the Merritts and the Oil Company were entered into, and during the pendency of the transactions under them, the statutes of the State of Michigan contained the following provisions, to-wit:

"4703: SEC. 7.—Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the

same was made in good faith, and without any intent to defraud such creditors or purchasers."

"4706: SEC. 10.—Every mortgage, or conveyance intended to operate as a mortgage of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township Clerk of the township, or City Clerk of the city, or City Recorder of cities having no officer known as City Clerk, where the mortgagor resides."

The staves in controversy, at the time they were seized by the plaintiff in error, were lying where they were originally piled by the Merritts. The lease from the Merritts to the Oil Company for the land upon which they were piled was not recorded, and it was virtually conceded upon the trial below, and assumed by the Court in its instructions to the jury, that there had been no such delivery and actual and continued change of the possession of such staves, as called for by section 4706 of the statutes of Michigan, above quoted, and the principal contention in the Court below was:

Whether under the agreement between the Standard Oil Company and the Merritts the title to the staves in controversy was at the time when they were seized by the plaintiff in error, under process against the Merritts, vested in the Oil Company as vendee or as mortgagee.

The Court below held that the title was vested in the Oil Company as vendee; that the case was therefore

governed by said section 4703 of the statutes, and the non-delivery and change of possession was only *prima facie* evidence that the sale was fradulent and void as against the Merritts, and held that it was only necessary that the plaintiffs show that the same wa in good faith and without any intention to defraud.

Several minor questions arose, as will appear by

ASSIGNMENTS OF ERRORS.

1. The Court erroneously refused to instruct the jury as requested, that under the two written agreements made between the Oil Company and the Merritts, the only interest that the Oil company acquired in the staves before they should be delivered at Cleveland, was as security for advances, in the nature of a mortgage interest; but on the contrary, instructed that as soon as said staves were piled and counted as provided in the agreement of August 28th, 1874, the title to the same vested in the Oil Company as vendee.

2. The Court erroneously refused to instruct the jury as requested, that it there was no actual delivery and continued change of possession of the property, the agreement of sale was void as against levying or attaching creditors of the Merritts, because not recorded as required by statute.

3. The Court erroneously refused to instruct the jury as requested, that the pile of about 50 M staves which appeared by the evidence not to have been piled upon the land mentioned in the lease given in evidence, if the evidence did not show that they were counted, the title did not pass to the plaintiff for any purpose, and that as to said 50 M staves, defendant was entitled to their verdict.

4. The Court erroneously refused to instruct the jury as requested, that under the agreement given in evidence between the plaintiff and the Merritts, no title to any staves passed until actually placed upon the land described in the lease, and actually counted by Donnely; and on the contrary, instructed the jury that the title passed to staves piled upon the land in the vicinity of the leased land.

5. The Court erroneously refused to instruct as requested, that no title passed to plaintiff as vendee to any staves other than those by the first agreement contracted to be sold, and if the jury should find from the evidence that there was any portion of the staves replevined which did not answer to the staves so contracted to be sold, as to such portion the plaintiffs are not entitled to recover.

6. The Court erroneously excluded testimony proposed to be given by the witness John J. Merritt, (Record, p. 13,) that 50 M of the staves were never counted, and no certificates given specially applicable to them.

PROPOSITIONS AND ARGUMENT.

1. ***The interest of the Standard Oil Company in the staves in controversy at the time they were seized by plaintiff in error, upon process against the Merritts, was that of mortgagees, and the legal title as owners was in the Merritts.***

Under the first agreement entered into between the Merritts and the Oil Company, (Record, p. 8,) it is clear that the staves were to remain the property of the Merritts until delivered at Cleveland, Ohio, and inspected. That agreement was not for the sale of staves then

in existence, but for the sale of staves thereafter to be manufactured, and delivered at Cleveland.

The second contract, however, declared in terms that when certain things had been done the delivery of the staves should be deemed complete, and that said staves should "then become and thenceforth be the property" of the Oil Company, "absolutely and unconditionally;" and the Court below seems to have considered and held this language to be conclusive alike as between the parties to the agreement and as against the world.

But we submit, that in construing the agreement, all its provisions must be considered, and that the parties cannot by any declaration, however absolute and positive, control its legal effect.

A deed absolute in form, made to secure the payment of money in terms, *expressly* vests an absolute and unconditional title to the property in the grantee, but it is elementary law that the terms of the deed are not conclusive, either upon its immediate parties or upon third parties interested.

Again, a bill of sale of personal property made as security, in terms vests an absolute and unconditional title in the vendee, yet it is an every-day occurrence for the Courts to declare upon proof of the circumstances under and purpose for which the instrument was made, and that its legal effect is to vest the title in the vendee as mortgagee.

In the case under consideration, the instrument upon its face declared the circumstances under and the pur-

poses for which it was made, and I submit that those circumstances and such purposes should have the same effect upon the construction of the agreement as if they were proved *aleundi*.

An analysis of this second agreement shows it impossible to give effect to the absolute declaration which it contains that the title of the property shall vest in the Oil Company as vendee, thus it provides

A. That such second agreement is a modification only of the first, which is to continue except as modified.

B. That after the piling and counting at Deerfield the Merritts are bound to draw, ship, and forward the staves, at their own expensa, to the Oil Company at Cleveland, "in the manner and upon the terms" agreed upon in the original contract.

C. That the counting at Deerfield is not to be in place of the inspection provided for by the original contract, but merely "to obtain as near as possible an approximate estimate of the staves piled, for the purpose of obtaining from time to time the amount of advances" the Merritts are to receive on the same.

D. That the Merritts are to pay interest upon the moneys advanced until the staves are delivered according to the original agreement, at Cleveland.

E. That the Merritts are to pay the cost of insuring the staves to the amount of $18 per M, and in case of destruction by fire, any loss above such $18 is to fall upon them, the Merritts.

In result then, whilst the agreement declares that the title to the staves when piled and counted at Deerfield, shall become and thenceforth be the property of the Oil Company, absolutely and unconditionally, it expressly

provides that not one of the usual results of a change of title shall attach to the transaction. In other words, it declares that the Oil Company shall sustain the character of vendee, with every attribute of vendee left out—shall have all the rights of a vendee, but be subject to none of the risks or liabilities: The play of Hamlet, with the part of Hamlet left out.

We submit that the agreement must be construed as in effect creating a lien upon the staves as fast as sawed, piled and counted, as security for the moneys which the Oil Company might advance upon them; in other words, as a chattel mortgage.

2. *Up to the time of the seizure of the staves in controversy by the plaintiff in error, there had been no delivery of them to the Oil Company, and no actual and continued change of possession from the Merritts to the Oil Company, within the meaning of section* 4703 *of the statutes of Michigan.*

The change of possession contemplated by the statute is an open, visible, substantial change, such as to give notice to the public that there had been a change in the ownership.

Copeland, J., in Doyle v. Stevens, 4 Mich., 93.

The change of possession of the property in this case consisted in piling them upon land described in the lease given by the Merritts to the Oil Company.

This land adjoined the stave mill of the Merritts, at which the staves were in course of manufacture, and certain of the buildings occupied and which continued to be occupied by the Merritts and used in connection with the mill, were situated upon the land covered by the lease.

The lease was not recorded, and there was nothing upon the ground to indicate that any lease had been made of it, or to distinguish the premises covered by the lease from the adjoining premises occupied by the Merritts, from which they were carved.

The piling therefore, of the staves upon the land described in the lease, gave no notice to the public that there had been any change in their ownership. There was no open, visible or substantial change of possession, and as before stated, the Court below so substantially held.

3. *As the conveyance from the Merritts to the Oil Company of the staves in controversy was in the nature of a mortgage, and as there was no actual and continued change of possession of such staves, the conveyance was absolutely void as against creditors of the Merritts. Such is the language of the statute, and the Courts have invariably construed the statute to mean just what its language imports.*

This statue was taken from the statutes of New York, and has frequently been construed by the Courts of New York.

Tyler v. Strong, 21 Barb., 198.

Farmers' L. & T. Co. v. Hendrickson, 25 Barb., 484.

Stevens v. R. R. Co., 31, Barb., 590.

Similar statutes have received similar construction.

Robinson v. Willoughby, 70 N. C., 358.

Bevons v. Bolton, 31 Mo., 437.

Actual notice to a creditor of the existence of a mortgage would not render it valid as against him. *Cases supra.*

But were it otherwise, the Record in this case describes no such notice, either to the creditors of the Merritts or to the plaintiff in error.

II.

Assuming that the agreement between the Merritts and the Oil Company operated as a sale, and not as a mortgage of the staves in controversy, the title to the 50,000 staves which the Record shows were never piled upon the land covered by the lease from the Merritts to the Oil Company, had not vested in the Oil Company at the time they were seized by the plaintiff under process against the Merritts.

As the agreement provided for no actual delivery of the staves to the Oil Company, but only for a constructive delivery by the performance of certain acts, we submit that nothing short of a literal performance would operate to pass the title.

The agreement expressly provided that the staves should be piled upon the land covered by the lease; that they should be counted; that a certificate should be given of the result of the count, and that ***thereupon,*** these acts being performed, the delivery should be deemed complete, and the staves thenceforth become the property of the Oil Company.

We do not see how the fact that the 50,000 staves now in question were piled upon land a short distance from the land covered by the lease, would have any greater force than if they had been piled upon land a long distance off.

III.

By the agreements between the Merritts and the Oil Company, no staves except of certain dimensions, and such as were a first-class, merchantable article were included.

The two reports given in evidence on the trial, showed that of the staves seized by the plaintiff in error and replevined by the defendant in error, 11,554 were second class, and 23,887 culls The Court below ruled that the Oil Company was entitled to a verdict and judgment for the e staves, confessedly not included in their agreement.

There were only two of the these inspection reports put in evidence on the trial, they having been offered to show the transaction between the parties, and not as fixing the whole amount of second-class and cull staves included in the staves upon which Hatch, the Sheriff, levied, and which were afterwards replevined by the Oil Company.

If the balance of the staves would average the same as those above reported, there would be of the second-class about 57,000, and of the cull staves about 119,000.

These two reports show 11,554 second-class, and 23,887 cull staves out of 171,683, and there was according to the inventory of the appraisers, in all, 850,000, or about one-fifth were included in the above reports.

And we submit that in case the Court holds these contracts constitute a sale and not a security, then as to the 50 M staves not piled upon the leased land, also the second-class staves and the culls included therein, did not pass to the Standard Oil Company.

And we submit that the ruling of the Court below was erroneous, and the verdict and judgment should be set aside and a new trial ordered.

ASHLEY POND,
Attorney for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

ALONZO S. HATCH,
Plaintiff in Error,

vs.

THE STANDARD OIL COMPANY OF CLEVELAND,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MOORE, CANFIELD & WARNER,
Counsel for Defendant in Error.

DETROIT:
GULLEY PRINTING HOUSE, 12, 14, 16 EAST LARNED ST.
1879.

SUPREME COURT

OF THE

UNITED STATES.

ALONZO S. HATCH,
Plaintiff in Error,

vs.

THE STANDARD OIL COMPANY OF CLEVELAND,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This is an action of replevin, commenced in the Circuit Court for the Eastern District of Michigan, to recover a quantity of white oak barrel staves. The facts, as shown by the record, are substantially as follows:

In the year 1874 John J. Merritt and Alfred E. Merritt were manufacturers of staves at Deerfield, Lapeer County, Michigan. The Standard Oil Company is, and then was, a corporation engaged in the business of refining and dealing in petroleum and its products at Cleveland, Ohio. On or about the 11th day of March, 1874, the Oil Company, desiring to purchase staves, entered into a written contract with the Merritts, whereby they agreed to sell "to the Standard "Oil Company one million (1,000,000) oil barrel staves upon "the following terms and conditions, to wit, to be sawed and "ended to thirty-four inches in length, full three-quarters of

" an inch in thickness when dry, and of an average width so " as not to require more than eighteen (18) to the barrel " when seasoned and jointed ; to be well manufactured from " good sound white oak, and to be in every respect a first- " class merchantable article : to be delivered on board of " cars in Cleveland, Ohio, at the rate of thousand each " month, and the entire number on or before the first day of " June, 1875, at and for the price of thirty (30) dollars per " thousand, subject to count and inspection by the Standard " Oil Company, who agree to receive and pay for the same " as fast as inspected." See Record, p. 8, folio 20.

Subsequently, and on the 28th of August, before the staves had been furnished under this contract, the Standard Oil Company and the Merritts entered into a new contract in regard to the staves, which is set forth in the record at pp. 9 and 10, folios 22, ~~and~~ 26 inclusive.

This new agreement recites the making of the original contract, and declares that the same is to continue subject to the modifications mentioned in the new contract, and then provides:

1. That the Merritts, the first parties named in the contract, should make and deliver the staves, (not yet delivered,) properly piled in some convenient place, to be agreed upon by the parties, on *land in Deerfield, Lapeer County*, controlled by the Standard Oil Company. That the delivery ~~shall~~ should be made as fast as the staves ~~are~~ should be sawed.

2. That the Oil Company should furnish a man to count the staves from week to week as the same should be piled.

3. That when the staves ~~shall~~ should be so piled and counted, the counter ~~shall~~ should give the Merritts a certificate of the amount piled, upon the presentation of which certificates to the Oil Company it should pay $17 per M as part of the purchase price of the staves.

4. That upon the piling and counting of the staves as provided in the contract, "*the delivery of the same* ~~should~~ shall *be deemed complete, and said staves then become and thenceforth be the property of the second party absolutely and unconditionally.*"

5. That the Merritts, "*as agents of the Standard Oil Company*," at their own expense, should, on or about the fifteenth day of August, 1875, begin to draw, ship and forward the staves to the Oil Company at the rate of not less than 100 M per month.

6. That the staves should be allowed to remain piled for the period of three months, before the purchasers should have the privilege of calling for the shipment of the same; but that it should be the privilege of the purchasers to insist that the staves should remain piled for the period of eight months before the shipment.

7. That the whole quantity should be delivered by January 1st, 1876.

8. That if the shipment of the staves should be delayed beyond the period of eight months, and not at the request of the purchasers, then the Merritts should pay interest, and in addition thereto should pay the cost of insuring.

9. The purchasers should have the privilege of calling for the shipment direct from the saw.

10. The purchasers to pay the balance of the contract price, deducting interest therefrom at ten per cent. per annum on the advances of $17 per M. from the time paid until the staves should be received at Cleveland, and also cost of insuring said staves against loss by fire after delivery at Lapeer, the amount of said insurance to be $18 per M.

11. If the staves should be destroyed by fire before delivery at Cleveland, the loss above said $18 per M., to fall upon the first parties.

12. If the Merritts should fail to draw, ship and forward the staves as agreed, then the Oil Company should be authorized to procure the same to be done, and to deduct the expenses attendant upon the doing of it, from the balance of the contract price; also ten per cent. interest on advances and insurance premium paid by them.

13. In case the advances upon the contract price, interest, insurance, and cost and expenses of shipment, should exceed the balance due upon the contract price, over and above the

$17 per M. advanced, then the Merritts should be liable to pay such excess on demand.

On October 4, 1874, the Merritts leased to the Standard Oil Company a piece of land for the period of one year, the lease containing the usual terms, covenants and conditions, and providing that the premises should be used for piling and storing staves. The Oil Company obtained the premises covered by this lease as a place where the staves in question should be delivered and piled according to the terms of the second contract above referred to. Subsequently the Merritts delivered and piled all but 50,000 of the staves upon the leased premises, the 50,000 being piled on land owned by the Merritts and about a hundred or a hundred and fifty feet distant from the large pile of staves. Under the provisions of the contract, one Donnely was employed to count the staves, and as the same were delivered and counted, the Merritts issued certificates of the amounts so delivered and counted, which were certified to by Donnely, and which were attached to drafts drawn upon the Standard Oil Company for the advance payment of $17 per M., as provided in the contract. These certificates were fourteen in number, and they were in the following form:

"CERTIFICATE OF STOCK DELIVERED AND PILED—NO. 1 CERTIFICATE.

"This is to certify that J. J. & A. E. Merritt, of Lapeer, "County of Lapeer and State of Michigan, has delivered to "the Standard Oil Company of Cleveland, O., (in compli- "ance with contract dated day of , 1874,) thirty "(30) thousand merchantable white oak oil-barrel staves, "from fifteenth day of September to seventh day of October, "1874, and have properly piled same on land leased to and "occupied by said Standard Oil Company, said land being "situated in Deerfield, County of Lapeer, State of Michi- "gan.

"(Signed) J. J. & A. E. MERRITT,

"Dated at Lapeer this seventh day of October, 1874.

"The above is correct.

"F. DONNELY,
"Inspector."

Upon the faith of these certificates the Oil Company paid to the Merritts, to apply upon the purchase price of the staves, the sum of $15,148.

On or about November 11th, Thomas H. Wheeler, an agent of the Oil Company, visited the premises covered by the lease, and there were then delivered upon the said premises, by the Merritts, between 25,000 and 40,000 of the staves. Subsequently, and in January, 1875, Wheeler went there again for the purpose of looking after the staves, and he then counted them. There were then manufactured and piled upon the said leased premises from 400,000 to 500,000. On the 10th day of July, 1875, he was again on the premises, one of the Merritts being with him, and made a thorough count of the staves, the number counted being 780,000. All the staves were upon the leased premises except the 50,000 already referred to, which were piled by themselves from a hundred to a hundred and fifty feet from the large pile. They counted the staves in both piles. There were no other staves about the premises, except a few elm staves, and these were not on the premises covered by the lease. The larger pile of staves were from 200 to 500 feet from the mill.

Subsequent to the counting of the staves by Wheeler, as above stated, and on the 15th day of July, 1875, Hatch, the plaintiff in error, as Sheriff of the County of Lapeer, seized the staves by virtue of a writ of attachment in favor of one Rodney G. Hart against the said John J. and Alfred E. Merritt. He subsequently had other attachments placed in his hands, and also two executions in favor of different persons against the Merritts, the amount claimed in said several writs being about $5,000. Hatch having refused to deliver up the staves, the Standard Oil Company brought this action of replevin, in the United States Circuit Court, against him to recover possession of the same. The case was tried before the late Judge Emmons, Circuit Judge, and a jury, and verdict and judgment were rendered in favor of the Standard Oil Company, which the plaintiff in error now seeks to reverse. The question in issue is that of ownership and the

right of possession of the property. The plaintiff below could not succeed unless it showed title to or immediate right of possession of the staves. Its title depends upon the contracts above referred to, and the subsequent delivery of the staves and the conduct of the parties in relation thereto.

There is no question of fraud involved, the good faith of the transaction between the Company and the Merritts was fully admitted and established in the Court below.

It was contended by the defendant in the Court below that the contracts referred to created only a mortgage interest on the part of the Oil Company; that they were to be treated as chattel mortgages and not as contracts of sale, and as they were not recorded or filed as required by the statute in reference to chattel mortgages they were void as against creditors of the Merritts. The Circuit Judge, among other things, charged the jury that the contracts amounted to an agreement of sale, and that if the staves were placed and piled upon the leased land, or upon land in vicinity of the leased land, the title passed to the purchaser. In behalf of the defendant in error we submit that this ruling was correct.

I.

THAT THE AGREEMENT OFFERED IN EVIDENCE IS TO BE CONSTRUED AS A CONTRACT OF SALE AND NOT A MORTGAGE, AND THAT THE TITLE TO THE STAVES IN QUESTION, WHEN THE SAME WERE DELIVERED AND PILED UPON THE PREMISES COVERED BY THE LEASE IN ACCORDANCE WITH THE CONTRACT, PASSED AT ONCE TO THE DEFENDANT IN ERROR.

This proposition covers the first assignment of error.

We claim that the agreement, and the delivery, counting and piling of the staves, which were made and completed in accordance with the agreement, before they were seized by the plaintiff in error, constituted an *absolute sale* of the property, and that the title passed to the purchasers. The plaintiff in error, by his counsel, contended in the court below,

that the agreement was simply a mortgage. That the position claimed by our opponents cannot be maintained, we think, will sufficiently appear from the language of the agreement itself.

In construing this contract, the court will, as in all other similar cases, look at the *intention* of the parties. Whether the title to the staves passed to the Oil Company or not, depends upon the *intention* of the parties at the time they entered into the contract, and upon the conduct of the parties subsequent thereto. We think the intention is very clearly expressed, and that it is declared in language which is is entirely unambiguous, for it provides, that upon the piling and counting of the staves "Said staves shall then become and thenceforth be the property of the second party absolutely and unconditionally." This language is susceptible of but one construction ; it is capable of but one meaning, and that is just what its terms literally imply; that the delivery of the staves when piled and counted shall be deemed *complete*, and that said staves shall *become, and thenceforth be the property of the second party absolutely and unconditionally.* To hold that under this contract the staves still remained the property of the Merritts, at the time of the attachment, after the same had been piled and counted, and certificates given for the same in accordance with the contract, and after the Oil Company had paid, upon the faith of said certificates, upwards of $15,000, it is necessary to nullify the clause of the contract which we have quoted. The court cannot hold that these staves were not the property of the Oil Company *absolutely and unconditionally*, at the time they were seized by the plaintiff in error, without entirely disregarding this most important and explicit clause in the contract. It is a cardinal rule of construction that all parts of a contract are to be considered and carried into effect. There is no way of giving effect to *this* clause of the contract under consideration, except to hold that the staves had become the property of the Oil Company, absolutely and unconditionally. Full effect can be given to every other clause of the contract,

without in any manner interfering with the clause referred to.

It is undoubtedly true, as a general rule, that where by an agreement the vendor is to do anything with, and has control of the subject matter of the contract for the purpose of putting it into that state in which the purchaser is bound to accept it; or where anything remains to be done to the *goods* for the purpose of ascertaining the price, as by measuring, weighing, and testing the goods, where the price is to depend upon the quantity or quality of the goods, the performance of these things is to be taken as a condition precedent to the transfer of the property. But this rule is not an unbending iron rule, which *necessarily* governs the contract of sale. The *intention* of the parties, as expressed in the contract, whether written or verbal, and their subsequent conduct respecting the subject matter, are the pivot upon which every case must turn. The court will look at the *intention* of the parties, and, unless that intention is contrary to some absolute rule of law, it will be given effect.

It was certainly competent for the parties in this case, to declare *when* the title to the property should be deemed to have passed to the purchasers. Ordinarily, where a completed delivery is made, the title will be presumed to have passed; but the parties may agree and intend, that notwithstanding the delivery is complete, and full acceptance made by the purchaser, that the title shall remain in the vendor until the happening of some future event. So they may agree that although the property remains in the possession of the vendor, and he is to do something in respect to it, that the title shall, nevertheless, be considered as having passed to the vendee.

In the case at bar, all of the staves except some 50,000 had actually been delivered to the vendees upon *their premises*, which was the place agreed upon as the place of delivery, they had been counted; and the advance payment of more than $15,000 had actually been made, before they were seized by the plaintiff in error. Both parties had acted according to contract. As between them we submit

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We think our argument is abundantly sustained by the authorities of which we cite the following:

Benjamin on Sales, Sec. 311, and Note C.

Thus lays down the rule:

"When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if when specified something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. * * * * Of course these *presumptions yield to proof of a contrary intent*, and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn in bulk. sold at a certain price per pound, or per bushel.' 'The question of transfer to, and vesting of title in, the purchaser always involves an inquiry into the intention of the contracting parties.' * * 'Whether the title to the property upon an agreement for a sale thereof, passes or not, depends upon the *intention* of the parties to the agreement.' And at p. 256 it is further said that: 'It is clear that the rule in regard to something remaining to be done does not apply, if the parties have made it sufficiently clear whether or not they *intend* that the property shall pass at once, *and that their intention must be looked at in every case.*"

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it cannot be successfully contended that the title to the staves had not passed, as no charge of fraud is made against either the Oil Company or the Merritts, the attaching creditors stand in no better position than the Merritts themselves. The staves had been delivered, piled and counted, at the place and in the manner stipulated in the contract; and the advance payment of $17.00 per thousand had been actually made by the purchasers, upon the representations of the vendors. As there is no charge of fraud in the transaction either as against the Oil Company or the Merritts, the attaching creditors stand in no better position than the Merritts themselves.

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2. Schouler's Personal Property, 221.

"Whatever the aspect presented by a contract of sale, the whole law concerning its effect in transferring the rights and liabilities of ownership, pivots upon this—that the mutual *intention* of the parties to the contract is to be studied out, and if not found unlawful, allowed to operate. Anything short of this doctrine is mere *presumption*, liable to rebuttal, and legal rules are but ancillary to the investigation of the cardinal fact."

See also Blackburn on Sales, 147, 149.

The following Michigan cases show that the *lex loci* is in full accord with the foregoing authorities:

Lingham vs. Eggleston, 27 Mich., 324.

This was a contract for the sale of a quantity of lumber piled in Eggleston's mill-yard, which, subsequent to the contract and before actual delivery to the purchaser, was destroyed by fire. The court held that under the peculiar circumstances of the case the title had not passed; but the rules of interpretation as laid down by the court, fully sustain what we claim in the case at bar.

At p. 326, Cooley, J., says:

"Where no question arises under the statute of frauds, and the rights of ~~the~~ creditors do not intervene, the question whether a sale is completed or only executory must usually be determined upon the intention of the parties to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the same. The parties may settle this by the express words of their contract, but if they fail to do so, we must determine from their acts whether the sale is complete."

"If the goods are sufficiently designated so that no ques-
"tion can arise as to the thing intended, it is not absolutely
"essential that there should be a delivery, or that the goods
"should be in a deliverable condition, or that the quantity or
"quality, when the price depends upon either or both, should
"be determined. All these are circumstances having an im-
"portant bearing when we are seeking to arrive at the inten-
"tion of the parties, but no one of them, nor all combined, are
"conclusive."

Referring to the rules laid down in Blackburn on Sales, p. 120, the Court say:

"But as these are only rules of construction of an agreement' they must yield to anything in the agreement which clearly shows a contrary *intention*. The parties may lawfully agree to an immediate transference of the property in the goods, although the seller is to do many things to them before they are to be delivered. And on the other hand they may agree to postpone the vesting of the property until after the fulfillment of any conditions they please."

Quoting Benjamin on Sales, 214, 215, the Court add:

"We think nothing prevents the parties from agreeing that the property in the specific thing sold and ready for delivery, is not to pass until certain conditions are accomplished; or that the property shall pass in a thing which remains in the vendor's possession and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured as a cargo of corn in bulk, sold at a certain price per pound or per bushel."

Whitcomb vs. Whitney, 24 Mich., 486.

The contract was as follows:

"Received of D. Whitney, Jr., $500 on account for all the upper qualities and select, common and cutting up, or fine common lumber that I make at Rock Falls, in the town of Sand Beach, Michigan, this season at fair price, what said Whitney can afford to pay. The lumber is to be delivered on rail of vessel when lumber is ready to ship, or when vessel is ready to send for it."

Subsequently the lumber was sawed by the vendor and ready for shipment, and notice given to the vendee, on receipt of which he sent an inspector to Rock Falls, who inspected and approved of about 64 M. feet of the lumber, acting for both parties in so doing; when inspected the lumber was at plaintiff's mill, but as fast as inspection proceeded, it was hauled to the dock, some 40 rods, to be ready for delivery when the vessel should be sent for it. The inspection was completed October 6th, and the vendee notified thereof on the 11th of the same month. Two days thereafter the lumber was destroyed by fire, and the vendee refusing to pay for it, action was brought for the value. *Held*, That the title had passed and that the vendee was liable for the purchase price. At p. 490 it is said:

"Where the case is not within the statute of frauds, manual delivery of the article sold is not essential to the passing of the title, unless made so by the understanding of the parties. *They may agree when and on what conditions the property in the subject of such a contract shall pass to the prospective owner. Their intention must be the governing consideration in every case.*"

Wilkinson vs. Holiday; 33 Mich., 388.

"If one bargains with another for the purchase of property and that is done in respect to which the parties agree shall pass the title, nothing more is generally requisite. The question is only one of mutual assent; whether the minds of the parties have met, and by their understanding the purchaser has now become owner."

See also Ortman vs. Greene, 26 Mich., 209.
National Bank of Marquette vs. Crowley, 24 Mich., 494.

The decisions of the Courts generally, both in this country and in England, are in accord with doctrine of the Michigan cases. They show that the intention of the parties will be carried into effect, without regard to any mere technical rules, whenever that intention can be ascertained and is not itself unlawful.

Macomber vs. Parker; 13 Pick., 175.

Plaintiffs and one Evans were joint owners of a quantity of bricks. Evans agreed to sell to plaintiffs his half at a certain price per M., and agreed to deliver all the bricks at a certain price for the cartage. After the delivery of one load the balance of the bricks were attached as the property of Evans. One question involved, was whether upon the facts stated such a sale and delivery had been made by Evans before the attachment as to divest his title. It was objected to the sale, first that the contract was not completed because the bricks had not been counted according to the stipulation between the parties. The whole bricks were estimated at 370 M. The Court say:

"It is true the bricks were to be counted, but that was to be done to enable the parties to come to a settlement of their accounts, and not for the purpose of completing the sale. * * * Where goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by a delivery, and the weighing, or measuring, or counting would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of a final settlement as to the price."

We submit that in the case at bar the staves having been delivered at the place designated in the contract, all that re-

mained to be done in respect to counting or measuring will be held to refer to a final adjustment or settlement between the parties.

Riddle vs. Varnum; 20 Pick., 280.

Trover for a quantity of lumber attached by the Sheriff, which, at the time of the sale, was lying in a pond frozen up. Plaintiff proposed to sell the same to one Curtis, and the following instrument executed by the parties:

"Received of James Riddle four shots of white oak plank by which I promise to pay him $26 per M., board measure; also one shot of black oak plank, &c. The above timber delivered in the mill pond, &c."

"Received of Curtis and Barstow $200 in pay for five shots of oak plank, &c., timber in question, remainder to be paid in 90 days from surveying. Canalage to be paid by Curtis and Barstow when they take the plank, &c., from the pond, the amount of canalage to be deducted from the residue of money due for the above plank, &c., when settled for." Timber was to be measured by the superintendent of the canal. Before it was so measured the purchaser became insolvent and it was attached by one of his creditors. Held that the title passed to the vendee. The Court say:

"That the rule is undoubtedly that when some act remains to be done in relation to the articles which are the subject of the sale, as that of weighing or measuring, and there is no evidence tending to show an intention of the parties to make an absolute and complete sale, the performance of such an act is a pre-requisite to the consummation of the contract. But where the property is in a state ready for delivery and the payment of the money is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected and the interest passes immediately to the vendee, although the weight or measure of the articles remains yet to be ascertained. Such a case presents a question of the *intention* of the parties to the contract. The parties affirming the sale must satisfy the *jury* that it was intended to be an absolute transfer."

Williams vs. Jackman; 16 Gray, 517.

Contract in writing for the building of a ship. *Held*, That the property would not pass to the vendee until the vessel was completed and delivered, or ready to be delivered. The Court say:

"This is a general rule of law. It must prevail in all cases unless the contrary intent is expressed or clearly implied from the terms of the contract."

Foster vs. Ropes; 111 Mass, 10.

In this case, quoting several authorities, at page 16 it is said:

"That the Court must look to the intention as drawn from the terms of the contract in order to determine whether the title to the property immediately passed."

Morse vs Sherman, 106 Mass. 430.
Marble vs. Moore, 102 Mass., 443.

Chipman vs. Shepherd 39 Conn., 413.

Trover for sundry bags of meal. Defendant was owner of about 800 bags of meal on board a vessel lying at a wharf in New Haven. Previous to January 10, defendant sold and delivered to different persons sundry of the bags of meal, so that there were left in the schooner on the 10th of January, between 500 and 600 bags, which he sold to one Gill. On the 25th of January Gill sold to the plaintiff 500 of the bags of meal then in the schooner, and plaintiff notified defendant of his purchase from Gill, and received authority to remove the same from the schooner, he subsequently paid Gill the purchase price. Gill became insolvent February 7th. On the 5th of February, plaintiff sent to the schooner for the meal and received 140 bags. Subsequently defendant hearing of the insolvency of Gill refused to deliver or allow plaintiff to take any more of the bags out of the schooner, giving as a reason that he had not received his pay from Gill. Held: That the title had passed to the plaintiff. At P. 421, the Court say:

"Where the subject of the sale is part of an ascertained mass of uniform quality and value no selection is required, and in this class of cases it is affirmed by authorities of the highest character, that severance is not, as a matter, of law necessary in order to vest the legal title in the vendee to the part sold. The title may and will pass if such is the clear intention of the contracting parties, and if there is no other reason than want of separation to prevent the transfer of the title"

Waldrom vs. Chase, 37 Me., 414.

Assumpsit to recover payment for a quantity of corn sold by defendant to plaintiff but not delivered. The bill of sale was as follows:

Messrs. A. P. & W. H. WALDRON.

Bought of D. T. CHASE,

500 B. Y. Corn	$ 345
63 Days Interest	3.62
	$348.62

Received payment by note. D. T. CHASE.

Plaintiffs were millers in Portland. Corn contracted to be purchased was a portion of a large quantity in bulk. After the purchase, plaintiff received 276 bushels but never received the balance, nor was it measured or set apart from bulk. Subsequently, defendants store with the corn was destroyed by fire. A custom was shown by which the purchasers of the grain, when millers, were to take the same away from time to time as they wished to use it. Held: That the title passed and passed as to the whole 500 bushels.

Fuller vs. Bean, 34 N.H., 290.

Trespass against deputy sheriff for certain goods seized by him as the property of the defendant. At p. 302 it is said:

"Though by a general rule of law, the sale is not complete if anything remains to be done between the parties, yet they may agree, either expressly or tacitly, to change this, and that the title to the property shall pass at once."

The court quote approvingly the language of Lord Brougham, in Logan vs. Le Mesurier, where he says, that

"The parties may buy or sell a given thing, nothing remaining to be done for ascertaining the specific thing itself, but the price to be afterwards ascertained in the manner fixed by the contract of sale upon a *quantum valeat*, or they may agree that the sale shall be complete and the property pass in the specific thing, chattels, or other goods, although the delivery of possession is postponed, and although nothing shall remain to be done by the seller before the delivery; or they may agree that nothing remains to be done for ascertaining the thing sold, yet, that the sale shall not be complete and the property shall not pass till something is done to ascertain the amount of the price. The question must always be, what was the intention of the parties in this respect, and that is, of course, to be collected from the terms of the contract."

Crofoot vs. Bennett, 2 Comstock, 258.

The owner of a brick-yard, by a written agreement, sold to the defendant 43 M. bricks, to be taken out of a new kiln which he was then putting up, and which were to be of a good merchantable character. On the next day defendant went to the yard for the purpose of having the brick delivered to him. The vendor agreed to burn the unfinished kiln, which he accordingly did. He subsequently executed to the plaintiff a bill of sale of all the bricks in said kiln. Afterwards the defendant opened the kiln and took and carried away the quantity which had been purchased by him, and the plaintiff brought an action of trespass. *Held*, That the title in the bricks had passed to the defendant, although they were not counted out, marked or separated from the residue, and that the action could not be maintained. The Court say, at p. 260: "But if the goods sold "are clearly identified, then, although it may be necessary "to number, weigh or measure them, in order to ascertain "what would be the price of the whole at a rate agreed "upon between the parties, the title will pass. * * * "The distinction in all these cases does not depend so much "upon what is to be done, as upon the object which is to be "effected by it."

Terry vs. Wheeler, 25 N. Y., 520.

Defendant was the owner of a quantity of lumber lying in his yard at Troy, which had been inspected and measured, and contracted to sell the same to one Elmer, by written bill of sale specifying the character, quantity and price, "*to be delivered to the cars free of charge.*" A portion of the lumber sold, constituted a separate pile, and a portion had to be taken from another larger pile. Within a few hours after the sale, and before the removal of any part, the lumber, without any fault on the part of the defendant, was accidentally consumed by fire. *Held*, That the title had passed and that the loss was that of the purchaser. Quoting Chitty on contracts, 332, the Court say:

"It is a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the *seller* be-

fore making delivery, transfers the right of property, although the price has not been paid or the things sold, delivered to the purchaser."

"The authorities are numerous where an expression is "used that if anything remains to be done by the seller the "title does not pass, but the cases which are referred to to "sustain the position, only go to the length of showing that "where something is to be done by the seller to ascertain the "identity, quantity or quality of the articles sold, or to put it "in the condition which the terms of the contract require, the "title does not pass." "Where the sale appears to be abso- "lute, the identity of the thing fixed and the price for it paid, I "see no room for an inference that the property remains the "seller's, merely because he has engaged to transport it to a "given point. I think, in such a case, the property passes at "the time of the contract, and that in carrying it the seller acts "as bailee and not as owner. The questions which arise in "such cases as to sales, are questions of *intention*, such as "arise in all other cases of the interpretation of contracts."

Russell vs. Carrington; 42 N. Y., 118.

Action to recover price paid by plaintiffs to the defendant for a quantity of corn which, after the agreement of purchase, was destroyed by fire and was never actually received into the possession of the plaintiff. The corn was stored in an elevator. The defendants gave to the purchasers an order upon the superintendant of the elevator for the delivery of the grain contracted for. The price was paid. The superintendent on receipt of the order, drew his own order as superintendent in favor of the plaintiffs, and the same was delivered to the plaintiffs, and by their agents handed to the master of the vessel by which it was intended to ship the corn. But before presentation of the order the elevator and its contents were burned. *Held*, That the title had passed to the plaintiffs and that the property was at their risk. In this case there had been no separation of the grain purchased from the bulk of grain in the elevator. The Court approve the doctrine laid down in Kimberly vs. Patchin, 19 N. Y., 330, and quoting 1 Parsons on contracts, 3 Ed., 44, the Court say:

"It is held that if the parties intended that the sale should be complete before the article is weighed or measured the property will pass before this is done."

Burrows vs. Whittaker; 71 N. Y., 291.

This is the latest reported New York case, and it affirms the doctrine laid down in the decisions already cited from that State. Defendant contracted to purchase of plaintiff all the lumber which the latter should deliver at a place designated on the D. River, before the first rafting freshet in the spring. The lumber to be paid for at a price specified for the good and for the culled, the defendant to furnish a man to cull and pile, and the lumber to be counted on the bank or estimated in the raft. Plaintiff commenced drawing lumber to the place designated, an employee of defendant assisting in culling and piling. But before the lumber so drawn had been counted or estimated a portion of it was swept away by the flood. *Held*, That this was sufficient to sustain a finding of a valid delivery and acceptance and to sustain a recovery for the purchase price; that the contract was not an entirety, and the delivery of the whole amount contracted for was not necessary in order to pass the title. The Court say:

"There is a strong ground for claiming with a fair interpretation of contracts that the title should pass upon the delivery of the lumber upon the bank, and it being thus delivered at a place designated by the defendant, it passed into his possession. * * * The delivery was thus complete. The culling of the entire quantity, or even the counting or measurement of the same, was not an essential element of the validity of the contract. This condition was not a condition precedent, upon which the execution of the contract depended. This case comes within the rule which holds that although something remains to be done, yet if it clearly appears to have been the intention of the parties that the property shall be deemed to be delivered and the title pass, it shall be so held."

We submit that this case is directly in point and governs the one at bar, so far as the question of delivery is concerned. Here the staves were delivered at the place designated by the parties. The culling and final counting was not a condition *precedent* upon which the execution of the contract depended. It was rather a condition subsequent to the delivery

and was to be made only for the purpose of final settlement between the parties.

See also **Armington vs. Houston, 33 Vermont, 443.**
Shelton vs. Franklin, 63 Ill., 338.
Graff vs. Fitch, 58 Ill., 377.
MacNamara vs. Edmister, 11 Hun., 597.

We submit that if goods may be delivered to a purchaser with a right to consume them, and yet the title remains in the vendor, because such was the intention of the parties, that there is nothing to prevent the title passing to the vendee, if such be the intention, after such a delivery as is shown in this case, although a further delivery is to be made, and although the right of selection or inspection remains in the vendee. See 33 Vermont 443 above cited

The English authorities also sustain our argument.

Turley vs. Bates, 2 H. & C., 200.

Defendant purchased a quantity of fire clay at a certain price per ton, which was to be carted away by defendant at his own expense, and weighed by him at the weighing machine of a third party. *Held*, That the property in the clay passed to the defendant on the completion of the bargain, and that the plaintiff might recover the price under a count for goods bargained and sold, although the clay had never been weighed. The Court, at p. 210, approves the rule laid down by Blackburn on Sales:

"That if it appears from the agreement that the *intention* of the parties is that the property shall pass presently, the property does pass, though there remain acts to be done by the vendor before the goods are deliverable, and it is said to be very doubtful whether the rule that where anything remains to be done to goods for ascertaining the price as weighing, &c., includes a case where all that remains to be done must be done by the buyer, with full authority from the seller to do the act."

In this case it will be borne in mind that at the time the staves were attached by the plaintiff in controversy, they had been actually delivered at the place agreed upon, and counted and piled, and certificates of count given. All that remained to be done in respect to future transportation, inspection and culling, was to be done by the buyers, with full authority from the vendors to do the act.

Young vs. Matthews, 2 Law Rep., C. P. 127.

M., who was a builder and brick-maker, had drawn several bills of exchange on one Northen, who had accepted them for his accommodation. M. was unable to pay the bills when they became due, and agreed to sell Northen 1,300,000 bricks, and an invoice of them was made out to him. Northen sent an agent to the brick-field with an order from M. for the delivery of the bricks. At the time, the owners of the field had put in a distress for rent, of which fact notice was given to the purchaser by M.'s agent, who also informed him that if the man in possession under the distress were paid off, he should be ready to deliver the bricks, and pointed out three clamps from which he should make the delivery, of which one consisted of finished bricks. A second was still burning, and the third consisted of bricks which had been moulded, but not burned. Subsequently M. became bankrupt, and the landlord sold under the distress sufficient bricks to cover the rent. Northen afterwards sold the remainder to the defendant, who removed them from the field. In an action brought by the assignees of M., it was held that a sufficient appropriation of the bricks had been made, and the property in the whole of them, though they were unfinished, passed to Northen at the time, such having been apparently the intention of the parties. Erle, C. J., said:

"There is no doubt that the parties could pass the property in all the bricks, whether finished or not, if such was their intention."

Martineau vs. Kitching, 7 Law Rep., Q. B. 436.

Plaintiffs, sugar refiners, contracted to sell to defendant 1,000 loaves or tillers of sugar comprised in four fillings, then manufactured and lying stored, (each filling apart) and marked, in their warehouse. It was agreed that the goods should remain in the vendor's warehouse at their risk for two months. The purchaser paid the approximate price of the goods and had taken away a portion of them. This approximate price was calculated on the probable weight of the goods, the actual price being afterwards to be adjusted on the whole fillings being cleared. A fire occurred on the

plaintiffs premises after the expiration of two months from the date of the sale to the defendant and the goods were destroyed. At the time of the fire plaintiffs had floating policies of insurance which covered goods on the premises, "sold and paid for, but not removed," but had no agreement or understanding with their customers as to any insurance, and the amount of insurance which the plaintiffs received from the underwriters was not sufficient to cover the loss of their own goods, exclusive of the tillers undelivered which they had sold to defendant. Held: By Cockburn, C. J., that the property in the tillers had passed to the defendant and that he was liable for the price without deduction on account of insurance money which the plaintiff had received from the underwriters. Blackburn and Lush J. J., were of the opinion that the property had passed to the defendant, but whether it had or not, under the terms of the contract, the risk after the lapse of two months was in the buyer. Cockburn, C. J., says:

"There is nothing to prevent the parties from agreeing that the property shall pass, and that the price shall afterwards be ascertained; that which is capable of being reduced to a certainty being for practical purposes a thing already certain or ascertained. It appears that the price had not been finally adjusted, but it is equally clear that the parties had agreed upon a price estimated between them, as the same was to be done provisionally as the price for the goods."

So in the case at bar the parties had agreed at $17 per M, as the provisional price of the staves.

Cockburn, C. J., further says:

"I think it is equally clear upon the authorities, that, according to the view now taken of this branch of the law, the question is one of intention between the parties. I take it now to be perfectly clear, especially after the case of Turley vs. Bates, that the real question in all these cases, is whether the parties did *intend* that the property should pass"

And at p. 450.

"If you can gather from the whole circumstances of the transaction that they *intended* that the property should pass, and the price afterwards to be ascertained, what is there in principle, what is there in common sense or practical convenience, which should prevent that intention from having effect? I protest I can see none; and unless there are authorities absolutely conclusive upon the point,

I will not give way to a rule, which appears to me to militate against principle, and to be inconsistent with common sense and convenience."

In regard to the clause of the contract respecting risk, it was held, that during the two months the goods were to be considered at the risk of the sellers, but after that at the risk of the purchasers. But it was also held that this fact did not prevent the title passing at once to the purchaser. In other words, the case distinctly holds, that the risk may be with the vendors, and yet the title have passed to the purchasers, if such be the intention of the parties.

Blackburn, J., said:

"That *prima facie*, the risk is in the person in whom the property is, and that if you show that a risk attached to one person or the other, it is a very strong argument for showing that the property was meant to be in him, but the two are not inseparable. It may be very well that the property shall be in one and the risk in the other.

At p. 455 he says:

"I think the case of Castle vs. Playford, 1 Law Rep., 7 Ex., 98, a clear authority of the court of the exchequer chamber, that where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not."

Ogg vs. Shuter, 10 Law Rep., C. P., 159.

By a contract for the sale of potatoes, they were to be shipped by the vendor, for London, free on board at Dunkirk, and the price was to be paid in cash against a bill of lading. The goods were shipped in sacks provided by the vendee, and were made by the bill of lading deliverable to the order of the vendor. Part payment price was made by the purchaser, in pursuance of the contract, and the vendor sent a draft for the balance of the purchase money to his agent in England, with a bill of lading endorsed to such agent, for presentation to the purchaser. Upon the arrival of the ship at her destination, the vendor's agent presented the draft to the purchaser for acceptance, but he, being under the impression that the shipment was short by sixteen sacks, would not accept at once for the full amount, but offered to accept the draft as soon as the vessel was unloaded, if the quantity was correct, or pay the balance at once, deducting for the deficiency, the vendors agent insisted upon immediate acceptance

for the full amount, and the purchaser, not immediately accepting, the agent sold the potatoes. In an action by the purchaser, against the agent for conversion of the goods, held: That the property had passed and that he was entitled to maintain the action. The ruling is based upon the *intention* of the parties and subsequent appropriation of the goods by delivery on board of the vessel.

See Also **Rugg vs. Minett, 11 East. 210.**

In 22 Wallace, 193, the Elgee Cotton Cases, this Court held that a person may buy chattels in an unfinished condition and acquire the right of property in them, though possession be retained by the vendor in order that he may fit them for delivery, if such be the intention of the parties.

Admitting that the contract when first entered into was merely executory, that it did not pass the property in the staves at the time it was signed and delivered, still we submit that the subsequent delivery, piling and counting of the staves at the place and in the manner provided for in the contract, was such an appropriation of the staves by the vendors, under the contract, as to pass the property to the vendee; and that when so delivered, piled and counted the title passed *eo instanti* to the vendee.

Benjamin on Sales, Sec. 358.

"After an executory contract has been made it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the appropriation of the specific goods to the contract. The sole element of deficiency in a perfect sale is thus supplied. The selection of the goods by one party and the adoption of that act by the other converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes."

Schouler's Personal Property, 248.

Recognizes the doctrine for which we contend and says:

"That when such appropriation has fairly taken place, the contract stands related to the specific chattels." At p. 250 it is said: "Where it is incumbent upon the seller by the terms of an agreement to select and separate, and then notify the buyer, and this is done, the property passes when the buyer accepts the situation, if not before."

Aldridge vs. Johnson, 7 E. & B., 885.

Plaintiff agreed to purchase from one Knight 100 quarters of barley out of a bulk in Knight's granary, at £2 3s. a quarter, in exchange for 32 bullocks at £6 each, the difference to be paid to Knight in cash. The bullocks were delivered. Plaintiff was to send his own sacks, which Knight was to fill, take to the railway for conveyance to the plaintiff and place upon trucks free of charge. Plaintiff sent sacks enough for only part of the grain purchased. These the vendor filled and endeavored to find trucks for them, but was unable to do so. Plaintiff subsequently demanded the barley, and Knight promised to forward it; but finding himself on the eve of bankruptcy, he emptied the barley out of the sacks into the bulk so as to make it undistinguishable. *Held*, That the property in the barley which had been placed in the plaintiff's sacks had passed, and that the plaintiff was entitled to recover the value of the same against Knight's assignee in bankruptcy. Lord Campbell, C. J., said:

"Looking to all that was done, when the bankrupt put the barley into the sacks *eo instanti* the property in each sackful vested in the plaintiff. I consider that here was an *a priorian* assent by the plaintiff. He had inspected and approved the barley in bulk; he sent his sacks to be filled out of that bulk. * * * There was also evidence of his subsequent appropriation, by his order that it should be sent on. There remained nothing to be done by the vendor, who had appropriated a part by the direction of the vendee."

Coleridge, J., said:

"I think the property in that portion which was put into the plaintiff's sacks passed to the plaintiff. That portion was subtracted by the vendor from the bulk in part performance of the contract, and there is abundant evidence of appropriation as far as the bankrupt could appropriate. There is also abundant evidence of assent by the plaintiff. He had before assented to the quality of the bulk, and, after the portion was put into the sacks, he desired that they should be sent to him."

Erle, J., said:

"Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested in the vendor only, the bankrupt. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed. That might be shown by sending the goods by the railway."

* * * "It was left to the bankrupt to decide what portion should be delivered under that contract. As soon as he does that his election has been indicated; the decisive act was putting the portion into the sacks. If it were necessary to rest the decision on the assent of the vendee in addition to this, I am of opinion that there is abundant evidence of such assent, for the vendee demanded over and over again the portion which had been put into the sacks."

We think the case at bar stronger in favor of our argument than the anthority cited. Here there was a delivery by the vendors at the place agreed upon and in the manner provided by the contract. The staves had been counted, not only by Donnely, but also by Wheeler, another agent of the vendees in company with one of the vendors. Sufficient assent was shown by the terms of the contract itself.

Alexander vs Gardner, 1 Bing N.C. 671.
Wilkins vs Bromhead 6 M. & G. 963.

Brown vs. Hare, 3 H. & N., 483.

Defendant at Bristol bought of plaintiff at Rotterdam, through a broker residing at Bristol, ten tons of the best refined rape oil, to be shipped free on board, which he had requested to be sent by next steamer. Subsequently and on the 7th of September five tons of the oil were shipped and notice given to the defendant, and on the 8th plaintiffs forwarded the invoices and bill of lading. The bill of lading was for delivery to plaintiff's order or assigns and endorsed by them to the defendant and ~~was~~ sent to defendant's broker, who received them on the 10th, after business hours, and on the 11th sent them to the defendant. The ship was actually lost before the papers reached the broker, and he knew it; but the defendant did not hear of the loss until shortly after receiving the bill of lading, which he immediately returned to the broker. *Held*, by Pollock, C. B., Martin and Channel, B. B., that the property in the oil vested in the defendants on its delivery on board the ship, and, consequently, plaintiffs were entitled to recover. The case was subsequently taken by appeal to the Court of Exchequer Chamber, where the decision was affirmed. Erle, J., said:

"In this class of cases the passing of the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the

act of the vendor alone. Here it passed by the act of the vendor alone."

See 4 H. & N., 821.

Langton vs. Higgins, 4 H. & N., 400.

By a written agreement, one Carter agreed to sell to plaintiff the whole of his crop of oil of peppermint, grown in 1858, at the rate of 21s. per pound, but if said crop amount to 250 bottles of oil, he agreed to deduct 6d. per pound from the 21s., and above that quantity 1s. per lb., "provided Messrs. Langton find the 21s. per pound, is more than they can reasonably afford." This agreement is made upon the condition that Messrs. Langton & Co. advance the said creditor £1,000 on account of the above crop, and pay the amount due at the time of the delivery by two, four and six months' bills. The advance payment was made by the plaintiff, who subsequently sent his bottles for the oil; and the vendor having weighed the oil, put it into the bottles, labeled them with the weight and made out invoices. Before, however, he had completed the filling of the bottles, he sold and delivered several of them to the defendant, against whom an action of detinue was brought for the oil of peppermint delivered to him. *Held*, That the putting of the oil in the plaintiff's bottles was an act of appropriation which vested the property in the plaintiff, and that he was entitled to recover. Martin, B., said:

"In my opinion, when two parties enter into a contract and put it into writing, that writing determines the terms of their bargain, and they cannot add to it. * * * * However, I found my judgment on one of the most useful rules in the law, viz: that when parties have put their contract in writing, that writing determines what the bargain is. * * * * In my judgment, when that crop was weighed and placed in the bottles of the plaintiff, the property vested in her."

Bramwell, B., said:

"A person agrees to buy a certain article, and sends his bottles to the seller to put the article into. The seller puts the article into the buyer's bottles, then is there any rule to say that the property does not pass? The buyer, in effect, says, I will trust you to deliver into my bottles, and by that means to appropriate to me the article which I have bought of you."

Tregelles vs. Sewell, 7 H. & N., 573

Plaintiffs bought of defendant "300 tons of old bridge rails at £5 14s. 6d. per ton, delivered at Hamburg, cost, freight and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance. *Held*, By the Court of Exchequer and affirmed in the Exchequer Chamber, that the property passed to the purchaser as soon as the goods were delivered on board the ship, and the policy of insurance and other documents were handed to the plaintiff."

Hyde vs. Lathrop, 3 Keyes, N. Y., 597.

Replevin for 7,000 flour barrel staves. The contract was as follows: "Received of H. W. Hyde $30 to apply on 30,000 barrel staves, at $7 per M., gross count, which are to be delivered at the Buffalo, Corning & Genesee Valley Railroad depot within three weeks, to be delivered on the cars." After the contract was entered into, the vendors delivered about 10,000 of the staves upon a car at the depot. The same were received by the plaintiff. Subsequently the contract was modified so as to make the balance of the staves, except about 10,000, deliverable at the depot and not upon the cars. Under this modified contract the vendors delivered about 7,000 staves at the depot, and piled them near the railroad track, and the same were subsequently seized by a constable on execution, issued upon judgments recovered against the vendors. *Held*, That the title to the staves was vested absolutely in the plaintiff, and that there was no leviable interest in the vendors. At the time of the levying, the staves had not been counted.

We submit that, under these authorities the delivery, counting and piling of the staves, in accordance with the contract, was a sufficient *appropriation* of the property, and taken in connection with the terms of the contract, clearly shows that the parties intended that the staves, when so piled, should become, and thenceforth be, the property of the vendee absolutely and unconditionally.

Bank v. Bangs, 102 Mass., 291.
Groff v. Belche, 62 Mo., 400.

1. The provision in the contract for the shipping and forwarding of the staves to Cleveland, and that there should be a final inspection there by the vendees, is not sufficient to prevent an immediate transfer of the title, upon delivery being made at Lapeer.

a. The Merritts, in forwarding and shipping the staves, were to act simply as *agents* for the Standard Oil Company, and not as owners of the property. Such are the express provisions of the contract.

b. By the terms of the contract the vendees, in case the Merritts failed to forward and ship, were authorized to do it themselves, or procure others to do it.

c. Numerous authorities, some of which we have already cited, hold that the mere fact that the shipping and forwarding are to be done by the vendor, will not prevent the title from passing at once to the vendee.

d. As already argued, the delivery, so far as vesting the title is concerned, was accomplished when the staves were piled and counted at the leased premises of the vendee at Lapeer, and they *then* became their property.

e. The culling and counting which was to be done at Cleveland was, as already shown, simply for the purpose of a final adjustment of accounts between the parties—it was not intended as a condition precedent to the vesting of the title in the vendees.

2. *The clause in the contract respecting insurance and risk in case of destruction of the staves by fire, does not show that the title had not passed to the oil company.*

Under this clause, the vendee *was at liberty* to insure the staves, after the same were delivered at Lapeer, to the amount of $18 per M. It was provided by the contract that if said staves should be destroyed by *fire*, the loss above the $18 should fall upon the Merritts.

a. The Merritts were to bear the loss *only*, in case of destruction by *fire*. Had the property been swept away by floods, or stolen, or otherwise destroyed, the loss would have fallen upon the vendee.

b. The vendee was under no *obligation* to insure; and in case he did not do so, the staves would be at their risk to the extent of $18 per M. And the same result would follow, if they should be unable to collect the amount insured from the underwriters.

When we consider that the staves were worth only $30 per M. in Cleveland, it will be seen that they were more at the risk of the vendee than of the vendors.

c. But if the contract had provided in express terms, that the staves, until they arrived at Cleveland, should be *wholly* at the risk of the vendors, it would furnish no argument that the parties did not intend the title should pass to the vendee, upon delivery of the staves at Lapeer; on the contrary, such a stipulation would lead to the contrary conclusion.

There was no need of the stipulation that the risk, or any part of the risk should be with the Merrits, after the staves were delivered at Lapeer, if it was not intended that the title should then pass to the Oil Company. Why introduce the stipulation at all if the title was to remain in the Merrits? The following cases are directly in point:

Martineau vs. Kitching, Law Repts., 7, Q. B., 436.

The contract in this case provided, that goods should remain at the sellers risk, but it was held that the title had passed. Cockburn, C. J., said:

"If the property in the goods had not passed to the buyers, why was it said that the goods should remain at the risk of the sellers? What would be the object and purpose of such a stipulation if the property still remained in them?"

This decision was expressly approved by this court, in the Elgee Cotton Cases, 22 Wallace 194, 195.

Much of the foregoing argument is unnecessary to meet the claim of defendant in the court below; it was there insisted in his behalf, not that the title did not pass to the vendees because the contract was *executory*, but because the relation which it created between the parties was that of mortgagor and mortgagee.

But we submit further:

THE AGREEMENT BETWEEN THE STANDARD OIL COMPANY AND THE MERRITTS HAS NONE OF THE NECESSARY ELEMENTS OF A CHATTEL MORTGAGE.

1. In order to create a chattel mortgage, there must be a *debt* which one party has contracted, and which he is liable to pay. The mortgage is simply a *security* for such payment.

2. There must be a right of redemption upon payment of the debt.

Under a chattel mortgage, the debtor has the right to redeem, by a suit in equity. In this respect, the law of real and chattel mortgages is identical.

This is the established law of Michigan upon this subject.

Van Brunt vs. Wakelee, 11 Mich., 177, and cases there cited.
Cary vs. Hewitt, 26 Mich., 228.
2 Story Equity Jurisprudence, §§ 1030, 1031.

Now here was no *debt* due from the Merritts to the Oil Company, and no *such* relation as that of debtor and creditor was created between them.

If there was, the Merrits could have paid the debt, and so terminated their obligations to the company.

It would be idle to claim that the Merritts had any right or equity of redemption which could have been enforced by a suit in equity or otherwise. They had *no* equity of redemption, and therefore, there was no chattel mortgage between them and the Oil Company.

Further we say:

That the Standard Oil Company never intended the contract to be a mere mortgage security, is shown by the fact, that it is a corporation organized for the purpose of refining and dealing in petroleum and its products. Loaning money upon chattel mortgage security, as our opponents claim was done by the company in its dealing with the Merritts, was wholly foreign to the business of the Company and in violation of its charter.

II.

The second assignment of error cannot be maintained. The Court properly refused to instruct the jury as requested by the plaintiff in error, "*That if there was no actual delivery and continued change of possession of the property, the agreement of sale was void as against the levying and attaching creditors of the Merritts, because not recorded as required by the statute.*"

The statute upon which the plaintiff in error relies, is chapter 167, 2 Comp. Laws of Mich., p. 1,456, sec. 7, of which provides, substantially, that every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, * * * or subsequent purchasers in good faith, and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith and without any intent to defraud. This section cannot apply.

1. Because the record shows, that the plaintiff in error admitted upon the trial in the Court below, that the oil company and the Merritts acted in good faith in making the contract.

Record p. 11, fol. 27.

2. Because it was proven on the trial and so found by the jury, that the sale was upon a full consideration.

3. Sec. 10 of the statute provides, substantially, that every *mortgage* or conveyance intended to operate as a *mortgage* of goods and chattels, which shall not be accompanied by an immediate delivery, &c., shall be void as against creditors of the mortgagor, and as against subsequent

purchasers and mortgagees in good faith, unless the mortgage or a copy thereof shall be filed in the office of the township clerk of the township where the mortgagor resides.

This section has no application to the case unless the contract in evidence is to be construed as a mortgage. If it was a sale, intended by the parties to pass the title, it was not necessary that it should be filed or recorded.

That it was not a mortgage, and that the parties intended an actual sale and absolute transfer of the title, we think we have already shown.

III.

Neither the third or fourth assignment of error was well taken.

1. The court properly refused to instruct the jury as requested in the defendant's third request, which was as follows:

"*That as to the piling of the 50,000 staves which appeared by the evidence not to have been piled upon the land mentioned in the lease given in evidence, if the evidence does not show that they were counted the title did not pass to the plaintiffs for any purpose, and as to this 50,000 the defendant is entitled to their verdict.*"

The evidence shows that the parties treated the 50,000 staves as a part of the staves delivered under the contract offered in evidence and included in it. The certificates of count issued, and upon which the Oil Company advanced their money, must have included both piles of the staves. At the time Wheeler, the agent of the Oil Company, was upon the premises in July 1875, he and one of the vendors made a thorough count of the staves in both piles including this 50,000. Under the testimony the jury might fairly have found that the piling of this 50,000 by themselves was merely accidental, and that they were actually intended to have been piled upon the leased premises, and to be included in the quantity sold to the Standard Oil Company. It sufficiently appeared in evidence that the certificates signed and issued by the Merritts included both piles of staves. The Oil Company had acted upon the faith of those certificates

in making its payments. These certificates declare that the staves had been piled upon the leased land. The Merritts would be estopped from showing that such was not the fact. It was conceded at the trial that there was nothing marked on the ground to show the extent of the premises covered by the lease; as all but the 50,000 were actually piled upon the leased premises, and the 50,000 only about a 100 or a 150 feet distant from the larger pile, it may well be assumed that the parties intended that they should be treated as having been actually piled upon the land, or that they supposed that they were so piled. The testimony is abundantly sufficient to warrant the jury in so finding. If the vendors actually intended this 50,000 as a part of the staves sold to the Oil Company, and issued their certificates accordingly, it would be at war with common sense and convenience to hold that the title did not pass, simply because the 50,000 were accidentally piled a few feet this side or the other side of the boundary line of the leased premises.

The same argument applies to the defendant's fourth request.

IV.

THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY, ACCORDING TO THE DEFENDANT'S FIFTH REQUEST, THAT NO TITLE PASSED TO THE PLAINTIFF AS VENDEE TO ANY STAVES OTHER THAN THOSE BY THE FIRST AGREEMENT CONTRACTED TO BE SOLD, AND IF THE JURY FIND FROM THE EVIDENCE, THAT THERE WAS ANY PORTION OF THE STAVES REPLEVIED WHICH DID NOT ANSWER TO THE STAVES SO CONTRACTED TO BE SOLD, AS TO SUCH PORTION PLAINTIFFS ARE NOT ENTITLED TO RECOVER.

This is the fifth assignment of error.

1. There is no evidence from from which the jury could have found that the staves did not answer to those contracted to be sold.

2. Even if among the staves delivered at Lapeer, there were some of a quality different from what is called for in the contract, still the vendees would have a right, under the circumstances, to waive the objection and accept them.

3. The vendees were entitled to the possession of the entire quantity delivered at Lapeer, for the purpose of making their selection and inspection; and therefore, as the action of replevin brought by them is merely a *possessory action*, it would have been error for the Court to have charged the jury as requested by the defendants.

Weld vs. Cutler, 2 Gray, 195.

Plaintiff was mortgagee of 200 tons of white ash coal and 200 tons of red ash coal, a portion of a larger quantity piled on the wharf of the mortgagor. He took possession by going near the pile and making declaration of the fact, and the mortgage being then due, he requested the mortgagor to sell the coal for him, which the latter agreed to do; but after selling five or six tons, the mortgagor filed his petition for the benefit of the insolvent laws, and the defendant was appointed his assignee, and took possession of all the coal and caused the same to be sold on his account. Plaintiff brought his action of trover. The Court say: "The mort-"gagee had received delivery of the property included in "the mortgage, and although it made part of a larger mass, "it was none the less a delivery to, and possession by, him of "the portion included in the mortgage. The property in "the part mortgaged, passed, it being left to the mortgagee "to select and separate it from the whole, which was placed "in his possession and control for that purpose. Under such "circumstances, it is very clear that neither the mortgagor "nor those claiming under him, could dispute the right of "the plaintiff to hold the entire property, until the object for "which its possession was delivered to him should have been "accomplished. The right of possession of the entire bulk "had become legally vested in the mortgagee for a lawful "purpose; neither the mortgagor nor his assigns had the "possession or the right to the immediate possession of it;

"neither of them therefore could maintain trespass or trover "against the mortgagee; nor could a creditor of the mort- "gagor, by attachment on mesne process, or seizure on exe- "cution, disturb a possession thus acquired. The power to "hold the whole property, by the mortgagee, was coupled "with an interest in him, which neither the mortgagor nor "his creditors could defeat." The Court further say that: "The principle on which the case rests, is that the delivery "of the entire mass to the vendee, under the contract of sale, "for the purpose of enabling him to separate and take out "the portion sold, makes the sale and delivery complete be- "tween the parties; that thereby the property in the articles "sold passes out of the vendor, and vests in the vendee, who "has the right to retain the whole, until he has had sufficient "time and opportunity to separate and take out the part "belonging to him in pursuance of the contract of sale."

That the action of replevin is merely possessory, and that the plaintiff in this suit was entitled to recover if it showed either a general or special ownership, or the right of possession, see

Hunt vs. Strew, 33 Mich., 85, 89.
Hatch vs. Fowler, 28 Mich., 205.
2 Greenleaf on Evidence, sec. 561–563.
3 Phillips on Evidence, Cowen, Hill & Edwards' notes, marginal page 491 and notes.

We submit, that upon our opponents own theory of the facts upon this point, the Oil Company had the right of possession for the purpose of selecting and culling the staves, and that it would have been clearly error for the Court below to have charged that it could not recover, the plaintiff in error having seized and taken, not only the culls, but the entire quantity, thus attempting to dispossess the Company altogether.

We respectfully submit that the instructions of the Court were correct, that there is no error in the record, and that the judgment should be affirmed.

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